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M A X I M S

O F

E Q U I T Y,

Collected from, and proved by, Cases, out of
the Books of the best Authority in the High
COURT of *CHANCERY*.

To which is added, the

C A S E

O F T H E

Earl of *C O V E N T R Y*,

Concerning the defective

EXECUTION of POWERS.

Lately adjudged in the High Court of Chancery.

By *RICHARD FRANCIS* of the *Middle Temple*, Esq;

The Third Edition.

In the SAVOY:

Printed by *Henry Lintot*; and sold by *DANIEL BROWNE*, at the *Black-Swan*, without
Temple-Bar; and *JOHN SHUCKBURGH*, at the *Sun*, next the *Inner-Temple-Gate*, in
Fleet-street.

MDCCXLVI.



TO THE READER.

IT is a common Objection against our Courts of Equity, that their Power being absolute and extraordinary, their Determinations must consequently be uncertain and precarious: That not being bound by any established Rules or Orders, nor circumscribed within the Limits of positive Laws, the unhappy Suitor must enter into a Court of Equity with Doubts and Fears; and if he has succeeded once, 'tis great Chance but he may fail upon a second Trial, either the Humour of the Judge, or the Judge himself being changed; and that this is true in Fact, for that after the most solemn arguing of Causes in all their Niceties and Circumstantial, Decrees made thereon have been frequently reversed by the same, and more often by succeeding Chancellors. It is Pity that Englishmen, who are so wont to boast of that invaluable Blessing of Freedom of Property, should be heard to give themselves so broad a Lye, as to say, that those Courts of Justice, where Matters of Property of the greatest Value are daily determined, are arbitrary and precarious in their Determinations. It is surely as consistent to say, that there is Freedom of Property in Turkey as well as in England, if the Courts of Justice, in which such Properties are determined, are arbitrary in both Places.

But

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But to this Objection it may be answered in general, that where Conscience is to direct the Judge, that Court cannot with any Propriety of Sense or Speech, be said to be arbitrary. The Judge knows and is sensible, that he sits there, not to Dictate according to his Will and Pleasure, but to be guided by that infallible Monitor within his own Breast; and surely he who is bound to determine according to the original and eternal Rules of Justice, is no more arbitrary, than he that is bound to Judge according to positive Laws and Statutes; since the one has no more Power to alter his own Conscience, than the other has to change the Law.

But if it should then be asked, why are not all our Judges to determine according to Conscience? And why are positive Laws made, since it must be confessed, that many Times the Rigour of them is Oppression and Injustice? To this it may be answered, that it were to be wished, that such Men could be always found, that would judge according to Conscience; but as the Depravity of human Nature is too apparent, and the Precepts of Conscience too often disregarded, it is absolutely necessary to restrain Judges to determine according to positive Laws, and to annex even Punishment to a Breach of Duty in determining contrary thereto.

Since then human Providence is too weak, to make Laws, which shall prove just in all Cases; and human Nature is too corrupt to be left solely to the Guidance and Directions of Conscience; from hence will appear the Excellency of our English Polity, which has so wisely obviated the Inconveniences arising from both these Extreams, either of having no positive Law at all, or too strictly adhering to it.

The Judges in our Courts of Law, are bound by their Oaths to observe the strict Rules of Law; and therefore as upright Judges, they must determine according to the known Customs and Statutes of the Realm, although they are sensible, that even in so judging, they do an Act of manifest Injustice.

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*justice. On the other Hand the Judge in a Court of Equity, is bound not to suffer an Act of Injustice to prevail, tho' it be warranted by the Forms and Proceedings of Law; and therefore he moderates the Rigour of several Penalties; relaxes the strict Ties of unreasonable Conditions; aids against unavoidable Losses, clandestine Frauds and the like; and thence it is, that Judgment shall be given in the same Case against a Man on one Side of Westminster-Hall, and quite contrary for him on the other; and yet both these agreeable to Justice. The narrow-minded Person, who labours under his great Affection for Form and Order cannot see the Beauty of this Contrivance, whereby Justice is produced from such jarring Jurisdictions; and what neither strict Form and Order, or absolute Latitude in judging, can separately produce, is effected by the excellent Tempera-
ture of both together. This hath been judiciously compared to the mingling of two Herbs, which of themselves are Poison, but together make a wholesome Medicine.*

But the great Difference between a Court of Law and a Court of Equity, is this; that the Court of Law, rigidly adheres to its own established Rules, be the Injustice arising from thence, ever so apparent; whereas the Court of Equity will not adhere to its own most established Rules, if the least Injustice arises from thence; for the same Reason, that enforces it to supersede the Rules of Law will enforce it to supersede its own Rules also. But it cannot from thence be infer'd that it is governed by no Rules at all: Besides such an Inference is easily to be disprov'd from Matter of Fact; for it is certain that many of the Rules of Equity, have yet been preserved inviolable in all Cases, because they have never been found to be unjust. I believe there is no Man but would think himself as secure in laying out his Money in taking an Assignment of a Mortgage in Fee from an Executor, as he would in taking a Conveyance from an Heir at Law. So a third Mortgagee without Notice, by buying in the first, (if it be not worth the while of the second Mortgagee to redeem him) will think himself as secure
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of that Estate, as he would of any other Purchase from a Tenant in Tail under a sufficient Common Recovery. Many other inviolable Rules of Equity might be instanced to the same Purpose; so that from the whole we must conclude, that a Man, if he be just and honest, may as safely depend upon a Rule of Equity for a Security of his Property, as upon any Rule of Law; but if he intends Fraud and Deceit in his Dealing, no Rule of Equity, no more than of Law, can protect him in it.

* Bacon's Preface to the Elements of the Common Law.

*Some of the Principal of those Rules of Equity, are attempted to be shown in the following Work. If the Imperfectness of it should be objected; to that it is answered, that the Intent was only to lead the young Student into a proper Method of his Enquiries into this Science of Equity; and therefore he is at Liberty, either to find out additional Rules, or to add Cases, under those he finds ready prepared for him. As to the Design it self (for the Manner of executing it, is wholly left to the judicious Reader) I may make bold to say, I have one of the best human Authorities for it *; who thought, That he could not confer so profitable an Addition unto the Science of the Law, as by collecting the Rules and Grounds, dispersed throughout the Body of the same Laws; for hereby no small Light will be given in new Cases, wherein the Authorities do square and vary, to confirm the Law, and to make it received one Way; and in Cases where the Law is cleared by Authority, yet nevertheless to see more profoundly into the Reason of such Judgments and ruled Cases, and thereby to make more use of them, for the Decision of other Cases more doubtful; so that the Incertainty of Law, which is the principal and most just Challenge that is made to the Laws of our Nation at this Time, will by this new Strength laid to the Foundation, be somewhat the more settled and corrected; neither will the Use hereof be only in deciding of Doubts, and helping Soundness of Judgment, but further in gracing of Argument, in correcting unprofitable*

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profitable Subtilty, and reducing the same to a more found and substantial Sense of Law; in reclaiming vulgar Errors, and generally the Amendment in some Measure of the very Nature and Completion of the whole Law; and therefore the Conclusions of Reason of this Kind are worthily and aptly called by a great Civilian, *Legum Leges*, Laws of Laws, for that many *Placita Legum*, that is, particular and positive Learnings of Laws do easily decline from a good Temper of Justice, if they be not rectified and governed by such Rules.

A
L I S T

Of the following

M A X I M S.

- I. **H**E that will have Equity done to him, must do it to the same Person.
- II. He that hath committed Iniquity, shall not have Equity.
- III. Equality is Equity.
- IV. It is Equity that should make Satisfaction, which received the Benefit.
- V. It is Equity that should have Satisfaction, which sustained the Loss.
- VI. Equity suffers not a Right to be without a Remedy.
- VII. Equity relieves against Accidents.
- VIII. Equity prevents Mischief.
- IX. Equity prevents Multiplicity of Suits.
- X. Equity regards Length of Time.
- XI. Equity will not suffer a double Satisfaction to be taken.
- XII. Equity suffers not Advantage to be taken of a Penalty or Forfeiture, where Compensation can be made.
- XIII. Equity regards not the Circumstance, but the Substance of the Act.
- XIV. Where Equity is equal, the Law must prevail.

MAXIMS

OF

EQUITY,

Collected from, &c.

Maxim I.

He that will have Equity done to him, (a) must do it to the same Person.

(1.) **T**HE Plaintiff mortgaged his Estate to the Defendant, and (b) afterwards the (c) Defendant advanced and lent more Money to the (d) Plaintiff on his Bond; the Plaintiff brought his Bill to redeem; the Defendant insisted to have the Bond-Debt, as well as the Mortgage-Money paid him:

Equity for the Mortgagee to have both Debts paid him. 2 Ch. Rep. 247. (c) The Defendant need not be originally both Mortgagee and Bond-Creditor; for if he lends the Money on the Bond, and hath the Mortgage by Assignment, there is the same Equity for him to have both Debts paid him. 2 Ch. Rep. 360. (d) The Act for which the Defendant is to pray Equity against the Plaintiff, must be done to the Plaintiff himself, (or to his Representative, as appears afterwards) for if the Mortgagor mortgage the Equity of Redemption, and the second Mortgagee brings a Bill to redeem, he shall not be obliged to pay the Bond-Debt, since the Money was not lent to him. 3 Salk. 84. So where a Lunatick, before he became such, made a Mortgage of good Part of his Estate for 50*l.* the Committee took up 3 or 400*l.* more upon it; the Court declared, the Mortgage should stand as a Security for the 50*l.* only. Vern. 262.

(a) This is called by the Council, a *Rebutter* in Equity. Vide 2 Ch. c. 194, 195.

(b) If the Money due on the Bond was lent first, and the Mortgage made afterwards; yet there is the same

Maxims of Equity.

Per Cur': Although there is no special Agreement, that the Land should stand as a Security for the Bond-Debt; yet the Mortgagor shall not redeem without paying both; *Vern.* 244. *S. P.* 3 *Salk.* 84. and in Case the Heir is bound in the Bond, he must pay the Bond-Debt, as well as the Mortgage-Money, before he can redeem. 2 *Ch. c.* 164. *S. P.* *Vern.* 245. And where there are two Mortgages, and one is defective, if the

(a) But he
must be
Heir; for
where Te-

(a) Heir will redeem, he must take both. *Vern.* 245. *S. P.* 2 *Ch. c.* 23.

nant for Life (Remainder to his Son in Tail) mortgaged the Lands, and the Son after borrowed Money of the Mortgagee, and gave the same Lands as a Security; yet he was not decreed to redeem his Father's Mortgage, as well as his own; because he is a Stranger to his Father, and is all one as a Stranger; 2 *Ch. c.* 23. which implies, that had he been Heir, he must have redeemed both or none.

(2.) If a Mortgage be made as a Counter-Security for entering into a Bond of 4000 *l.* and afterwards the Mortgagor prevails upon the Mortgagee, to enter into a further Bond for 2000 *l.* although there is no Agreement, that the Mortgage shall stand as a Counter-Security for entering into the Bond for the 2000 *l.* yet the Heir of the Mortgagor shall not redeem without paying that also. 1 *Ch. c.* 97.

(3.) The Defendant purchased Lands in his own Name in Trust for the Plaintiff, and became engaged for other Debts of the Plaintiff; the Bill was, to have the Lands on Payment of what the Defendant paid for them; but the Plaintiff could not have a Decree, but must pay the one Monies, as well as the other. 2 *Ch. c.* 87.

(4.) Two several Estates were conveyed to the Defendant, upon Trust for Payment of several and distinct Debts; the Plaintiff, Heir at Law, by his Bill prayed an Account upon both Estates; but at the Hearing, would have had his Bill dismissed, as to one of the Estates, and have the Account taken for the other only; but it was decreed, that an entire Account should be taken of both Estates. *Vern.* 29.

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(5.) If the Husband sues in the Ecclesiastical Court for a Portion due to his Wife; the Court of Chancery will order an Injunction to stay Proceedings there, 'till he make a competent Jointure. *Totb.* 114. And if a Man marries a Feme, whose Estate is in Trustees, if he comes into Equity to compel the Trustees to convey the Estate, he shall not have such Equity, without doing Equity to his Wife, by making a suitable Settlement or Provision for her. *Vern.* 40.

(6.) If Lands are extended on a Statute or Judgment, at much less than the real Value; and the Conusor will come into Equity, to make the Conussee account according to the real Value; he shall not be relieved without paying the Conussee all that is due to him, for Principal, Interest and Costs, though they exceed the (a) Penalty. *Vern.* 350.

(a) This is one Case, where Equity

will carry the Debt beyond the Penalty of the Security; as it will do also, where the Party has been delayed by the Injunction of this Court, or the like. *Vern.* 350. So where the Plaintiff came to be relieved against the Penalty of a Bond; it was so decreed, but upon the Payment of Principal, Interest and Costs; and though the Principal, Interest and Costs exceeded the Penalty; yet the Decree was affirmed upon an Appeal to the House of Peers. *Sh. P. C.* 15. But observe from these Cases, that whenever the Debt is carried beyond the Penalty of the Security, it is always for a Defendant; but there is no Precedent, where a Court of Equity will carry the Debt beyond the Penalty for a Plaintiff. *Vern.* 350. As where the Vendor of Lands entered into a Recognizance of 1000*l.* Penalty, for the quiet Enjoyment of the Vendee; the Court declared, they could not go beyond the Penalty of the Recognizance. *1 Ch. Rep.* 95. So where a Trustee in a Recognizance released it without any Consideration; upon a Bill by the *Cestui que Trust* against the Trustee, the Court decreed him to pay the Principal and Interest, but not to exceed the Penalty. *Vern.* 342. So where the Master of the Ship covenanted with the *East-India Company*, to pay a certain Mulct for every Cloath, &c. carried in the Ship; the Master took the Defendant as his Mate, who made the like Agreement with the Master, *Mutatis Mutandis*, and gave a Bond in 50*l.* Penalty, that he should not carry Cloaths, &c. but the Defendant, without the Knowledge of the Master, carried so many Cloaths, that the Mulct came to 70*l.* which the Company deducted out of the Master's Wages; and therefore the Master in a Court of Equity pray'd the Defendant might repay him; the Defendant demurred, for that Relief, for more than the Security by Bond, was not proper in Equity; the Demurrer was allowed. *1 Ch. c.* 226. So if a Settlement or Devise is made of Lands for Payment of Debts, and there is a Bond-Debt, the Interest of which hath out-run the Penalty; altho' such Conveyances for Payment of Debts, are construed favourably, yet the Creditor, on a Bill brought by him, was decreed to no more than the Penalty. *1 Salk.* 154. And the Reason why the Court, on a Bill brought by such Creditor, will not carry the Debt beyond the Penalty, seems to be, because he has chosen his own Security; and has made himself Judge what Recompence he shall have, in case the Debtor pays him not, or performs not his Agreement; and there is no Equity, that his Security should be enlarged or bettered for him: But when he is Defendant, he hath this *Maxim* on his Side. So Note the Difference.

(7.) The Plaintiff, a young Gentleman in Want of Money, employed *J. S.* to borrow 500*l.* *J. S.* employed *J. D.* who took up of the Defendant (a Silk-Man)

Maxims of Equity.

(a) A *Quere* is made in the Book, as to Interest; and *Note* in the following Case, *Vern.* 467. there is no Mention made, that the Defendant should have Interest.

(b) These hazardous Bargains (to be paid double or treble, or to have an

Man) Silks to the Value of 500 *l.* as the Defendant charged them to be worth; the Plaintiff gave his Bond and Judgment to the Defendant for the 500 *l.* *J. D.* sold the Silks for 250 *l.* and gave the Plaintiff 200 *l.* of the Money, but kept the other 50 *l.* for his Pains; the Plaintiff was relieved against his Bond and Judgment, but upon Payment of the 200 *l.* and (a) Interest. 1 *Ch. c.* 276. So where three young Gentlemen, Heirs to good Estates, borrowed Money of the Defendant, to be paid (b) five Times as much, after the Death of their Fathers; and for that Purpose the Defendant had gained Securities from them, for Payment of great Sums of Money; one of them brought his Bill to be relieved, and the Court decreed his Security to be deliver'd up, on Payment of what the Defendant really and *bona fide* paid to him alone, and for his own proper Use. *Vern.* 467.

Estate of double or treble the Value of what is at present advanced, after the Death of a Tenant for Life; but if such Tenant for Life out-lives the Person to whom the Money is lent, then the whole to be lost) are not always set aside in a Court of Equity; for such Bargains may be fair, and there must be Circumstances of Fraud to overthrow them. *Vide the Case of Nott and Hill.* 2 *Ch. c.* 120. *Vern.* 167. *Barny and Beak.* 2 *Ch. c.* 136. *Batty and Lloyd.* *Vern.* 141. But always where they are set aside, though for Fraud, the Plaintiff must do Equity to the Defendant, by paying him what was really lent. But if such fraudulent Person comes as Plaintiff into a Court of Equity, to have what was really and *bona fide* lent, he shall not have it, because he has committed Iniquity. *Vide Maxim 2. c. 4.*

(8.) If a Man prays an Injunction to stay Proceedings at Law upon a Bond, he shall not have it; except he will give Judgment, and be bound by (c) Order to bring no Writ of Error. *Vern.* 120.

(c) An Offer to give a Release of Errors is not

sufficient; for he may, notwithstanding, bring a Writ of Error, and put the Defendant to plead such Release, and so delay Time, as long as if no Release of Errors had been given. *Vern.* 120.

(9.) The Wife joined with her Husband in a Mortgage, and levied a Fine with Intent to bar her Dower; and in Consideration thereof, the Husband agreed the Wife should have the Redemption of the Mortgage; and the Husband afterwards mortgaged the Estate twice more; the subsequent Mortgagees brought their

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5.

Bill to set aside the Agreement as fraudulent against them; which was decreed; but in Regard the Wife, in Confidence of this Agreement, had barred her Dower, (*which was not intended to be barred as against the Plaintiffs*) the Court decreed, that if she survived her Husband, she should enjoy her Dower; and that she should not be put to her Writ of Dower, because they might convey away the Estate, and she not know against whom to bring her Writ of Dower, and therefore decreed her Dower to her. *Vern. 294.*

Maxim II.

He that hath committed (a) Iniquity, shall not have Equity.

(a) But it seems, the Iniquity must have been done to the Defendant himself; for where the Plaintiff had, to avoid a Sequestration in the Time of the great Rebellion, sworn in an Answer that he was

(1.) **I**F the Lessor will avoid the Lease for Non-payment of the Rent at the Day, Equity will relieve against such (b) Forfeiture. But if the Lease were gained by Fraud, or granted upon a false Suggestion, Equity in such Case will not relieve the Lessee; for that were to relieve Fraud in Chancery. *Car. 45.*

satisfied the Debt; and after the Restoration brought a Bill for it; tho' such Answer was objected to him, yet the Court would not suffer it to be read, but decreed the Plaintiff his Debt. *1 Ch. c. 154. (b) Vide Max. 12.*

(2.) By a Marriage-Agreement, the intended Wife was to have more, than her Father, (indebted) and the Mother and two Daughters unprefer'd would have left; the Court would not decree the

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Agree-

(a) Though it is a common Equity to decree (a) Agreement, but left the Plaintiff to (b) Law. 2 Ch. 17.

specifick Performances of Agreements. *Vide Max. 13. c. 1.* Yet by this Case it appears, that where they are extremely Unreasonable and Iniquitous, the Court will not decree them. So in a late Case since the Year 1720. a Bill was brought in the Exchequer for a specifick Performance of Articles for a Purchase made in that Year, whereby it was agreed that forty Years Purchase should be paid for the Lands; there was a Decree in the Exchequer for a specifick Performance, but it was reverted in the House of Peers. And though the Doubtfulness of Equity may be here objected, since no Rule is settled, how many Years Purchase is a reasonable Price for Lands; yet it may be answered, that no certain Rule can be drawn from the Price of Lands, whether the Articles for a Purchase shall be performed or not; because the Iniquity of the Bargain does not depend always upon the Price; for what may be a reasonable Price in one Case, may not be so in another. But it is a certain Rule, that where the Bargain is plainly iniquitous, and it is against Conscience to insist upon it, (as in the Case of forty Years Purchase) Equity cannot support it; for that would be to decree Iniquity. (b) Here the Agreement was not fraudulent, or gained by Surprise, and therefore not to be set aside; and the Court not being willing to decree the Whole, and not being able to decree Part, (for a Court of Equity cannot assess Damages) it must necessarily go to Law.

(3.) The Plaintiff Tenant for Life of a Copyhold Estate, *durant' viduitat'*, felled Trees; which at a Court-Baron was presented, and found a Waste by the Homage, and consequently a Forfeiture; the Bill was to be relieved against the Forfeiture, offering that if it did appear to be Waste, to make Satisfaction; the Court decreed an Issue to try, *whether the primary Intention in felling the Timber was to do Waste*, declaring that in Case of a (c) wilful Forfeiture, it would not relieve. 1 Ch. c. 96.

(c) It must be intended wilful Waste; and

that was the Issue tried, though the other was directed, and being found for the Plaintiff, he was relieved. *Vide Max. 12. c. 1.*

(4.) The Plaintiff for 90 l. lent, got a Bond of 800 l. from the Defendant when he was drunk, and had Judgment thereon; the Defendant in Right of his Wife was entitled to certain Lands, that were estated in other Persons in Law, in Trust for her; the Bill was to have those Lands subjected to the Plaintiff's Satisfaction here, inasmuch as the Defendant was entitled to the Trust in Right of his Wife: But the Court would not give the Plaintiff any Relief, not so much as for the Principal he had (d) really lent; and the Bill was dismissed. 1 Ch. c. 202.

(d) But if the Defendant in this Case had

come into Equity, to set aside the Judgment for Fraud, Equity would have obliged him to pay the present Plaintiff what was really lent. *Vide Max. 1. c. 7.*

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(5.) The Defendant by a Trick, got the Deed into his Hands, and burnt or cancelled it: *Per Cur.* where Deeds are suppressed, *Omnia presumuntur*, and would not direct a Trial at Law, which had not been denied, had not the Defendant been guilty of the Fraud. 1 *Ch. c. 293.*

(6.) The Plaintiff having debauched the Defendant, to whom he made false Addresses of Marriage, and got her with Child, gave Bond of 500 *l.* conditioned for the Payment of 50 *l.* there was no Place appointed in the Bond, where the Money should be paid; and therefore he brought his Bill and offered to (a) bring the 50 *l.* into Court; but the Court would not grant an Injunction. 2 *Ch. c. 15.*

(a) But a Court of Law will relieve against the Penalty, upon bring-

ing the Principal, Interest and Costs into Court; and that being the Rule there, no Consideration can be had of this Maxim. Vide 6 *Mod.* 101. & *Stat. 4 Anne*, for Amendment of the Law.

(7.) It was decreed, that the Husband should pay the Wife 300 *l.* *per Ann.* for Alimony, until they cohabited by Consent; he brought an original Bill, praying that the Alimony might cease, offering to be reconciled and to cohabit with her; though it was insisted for the Wife, that the Decree was 'till Cohabitation by Consent, which was to be understood mutual Consent; yet *per Lord Keeper*, I will not continue the Alimony, if she will not cohabit. But she shall immediately return; and she shall have no Benefit of the Alimony 'till she do, but take her Remedy in the Court Ecclesiastical. 1 *Ch. c. 250.*

(8.) The Husband granted some Rents, in Trust for the sole Use of the Wife; and after bought in some of that Tenant's Estates, whereby the Rents could not be recovered at Law: She brought her Bill, to have these Rents made good to her by the Decree of this Court; but the Husband swearing in his Answer, that she had eloped from him, and that she was a very lewd Woman, the Court would make no Order in

in it ; but only that the Husband should stand in the Place of the Tenants, and should admit the Rents payable by the Tenants to be still in Being, and then she might proceed at Law, and recover the Rents there, if she could. 2 *Ch. c.* 102. *S. C. Vern.* 53.

(9.) The Plaintiff and Defendant having married two Daughters of J. S. upon his Decease there were some loose Papers, that concerned the Account between the Plaintiff and his Father-in-Law, put up together in a Bundle, and covered with a Paper tied up with a Tape, and sealed by two Persons then present, and delivered to the Defendant to be safely kept, being then told they were Matters of Concern : And there being now an Account directed of the Estate of J. S. which was to be equally distributed between the Plaintiff and Defendant ; the Defendant demanded as due from the Plaintiff to his Father-in-Law for Diet, &c. 2300 *l.* But upon Proof made that the Defendant had altered the Bundle of Papers so sealed up, and displaced them, and that it could not be known what Papers might have been taken out ; and the Master having reported, that the Defendant had suppressed the Evidences ; the Court for that Reason disallowed the Defendant's whole Demand against the Plaintiff, tho' the Defendant swore he had produced all the Papers, and though the Papers produced appeared to be Half-yearly Accounts, and related one to the other, and not one missing ; but the Account was thereby carried down within a little Time before the Testator's Decease ; and tho' the Lord *Chancellor* declared himself satisfied that all the Papers were produced ; yet for the Reason aforesaid, wholly disallowed the said Demand. *Vern.* 452.

Maxim III.

Equality is Equity.

(1.) **W**HERE an (a) Heir buys in an Incumbrance for less than is due upon it; he shall be allowed no (b) more than what he really paid for it, as against other Incumbrancers upon the Estate; *2 Vent. 353. S. P. Vern. 49. 1 Salk. 155. for the taking away one Man's Gain, to make up another's Loss, is making them both equal; and here the Gain the Heir would have made, if the whole Money due on the Incumbrance should be allowed him, shall be taken from him, to make up the Loss of the other Incumbrancers upon the Estate. So also as against younger Children, who have Portions charged upon the Estate: As where the Estate was settled upon Trustees to pay the Heir 100 l. per Ann. in the first Place, and then to make a Provision of 100 l. a-piece for younger Children; the Heir purchased in a Statute, which was an Incumbrance upon the Estate; it was decreed, that in Case of Deficiency to pay the younger Childrens Portions, he should be allowed no more than what he really paid for it. Vern. 335. So also as against Legatees. 1 Salk. 155. So also as against a real Purchaser, that purchased without Notice of the Incumbrance so bought in. Vern. 464.*

(a) So it is in Case of an Executor or Trustee.

Vern. 49. S. P.

1 Salk. 155.

(b) Except he bought it in to protect

an Incumbrance to which he himself is entitled. So

likewise in Case of an Executor or Trustee.

Vern. 49. Vid.

Maxim 14.

c. 2.

(2.) A Stranger, who buys in a prior Incumbrance, shall be allowed (c) only what he really paid, as against other Incumbrancers. *Vern. 476. So also as against a*

(c) Vide

1 Salk. 155.

which seems contrary;

that he shall be allowed all that is due upon it, even against other Incumbrancers and Legatees; which I take not to be well reported; for as against other Incumbrancers, by this Rule of Equality, his Gain should be taken from him to make up their Loss; and tho' there may be more Doubt as to Legatees, who cannot be strictly said to be Losers, tho' they are not paid their Legacies; yet there seems the same Reason to take such Gain from a Stranger in their Favour, as from an Heir, as by the same Case is admitted.

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(a) But as against the Owner of the Estate, who made the Incumbrance, or his Heir, he shall be allowed the Whole that is due upon it. *Vern. 336. S. P. Vern. 476. For the Owner is no Loser, when he pays the whole Money due, and therefore no Equality to take away one Man's Gain for the Benefit of another, who is no Loser.*

(a) Purchaser, who purchased without Notice of such Incumbrance. *Vern. 336. S. P. ibid. 464.*

(3.) The Testator devised two several Estates for the Payment of his Debts, and devised also an Annuity out of one of them; the Trustees sold that Estate out of which the Annuity was payable; Equity decreed the other Estate to stand charged with the Annuity. *1 Ch. c. 295. For by charging the other Estate with the Annuity, the Heir will not gain the accidental Advantage of having his Estate discharged of the Annuity; nor the Annuitant lose his Annuity, and so both will be equal.*

(4.) The Testator having a Daughter by his first Wife, voluntarily charges his Lands at B. with 3000 *l.* for her Portion; and afterwards upon his second Marriage settles a Moiety of those Lands upon his Wife for her Jointure, without taking Notice of the Charge of 3000 *l.* and apprehending the Charge of 3000 *l.* would be good against the Jointure, (which it would not, being voluntary against a Purchaser, which a Jointress is) and taking Notice thereof, he devises other Lands at C. to his Wife in Lieu of her Jointure; the Heir and the Wife agree together after his Death, that she should adhere to her Jointure, whereby the Daughter would lose her Portion, and the Heir hold the Lands discharged of the Devise; but it was decreed, that the Daughter should hold such Part of the Land at C. as should be equal in Value to such Part of the Land at B. as were comprised within the Jointure until her Portion was raised. *Vern. 219. S. C. 2 Ventr. 363. For hereby the Heir will not gain by having his Estate discharged of the Devise, nor the Daughter lose her Portion; so both will be equal.*

(5.) The Testator being seised in Fee, entred into a Statute; and devised a Legacy of 500 *l.* The Conusee took all the personal Estate in Execution, so that no-
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Maxims of Equity.

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thing was left to pay the Legacy; Equity decreed the real Estate to stand (a) charged with the Legacy. 2 Ch. c. 4. And that though the Land was not charged with the Legacy originally; yet since there was enough of the personal Estate to pay the Legacy, if it had been so employ'd; and that the personal Estate is employ'd for Payment of Debts in Ease of the Heir and Lands; so much of the real Estate as is eased by the personal Estate, shall be liable to the Legacy. 2 Ch. c. 117. *For by charging the real Estate with the Legacy, the Heir will not gain the accidental (if not fraudulent) Advantage of having his Estate discharged of the Statute, nor the Legatee lose his Legacy, and so both will be equal.*

(a) Note; The real Estate is here charged in Favour of a Legatee; much rather therefore in Case of a Creditor, and it is a well known Case in Equity, that if the Creditors who may charge the real Estate, will yet take the personal Estate for their Satis-

faction, whereby the simple Contract Creditors, who could only charge the personal Estate, will lose their Debts; Equity will place such simple Contract Creditors, in the Room of the Creditors who could have charged the real Estate; and will charge the real Estate for their Benefit, with as much as the Value of the personal Estate, taken in Execution; for such Advantage shall be taken from the Heir, to make up the Loss of the simple Contract Creditors, that both may be equal. But here Note a Diversity in the Case of Legatees; where the Lands descend to the Heir, and where they are devised; for H. seized in Fee, and indebted by Bonds, by Will gave Legacies to younger Children; and devised his Land to his eldest Son in Tail; the eldest Son being also Executor, pay'd the Bonds with the personal Estate; and the Legatees brought a Bill, to come against the real Estate in the Place of the Bond Creditors, and to be paid out of the Land: The Court seemed to admit, that if the Lands had descended, the Legatees might have been relieved in this Manner; but since the Testator had devised them, it was resolved that they ought to be exempted; for it was as much the Testator's Intention that the Devisee should have the Land, as the others their Legacies. 2 Salk. 416. Vide Max. 14. c. 13. But in the Case of Creditors, no such Intention of the Testator can prevail, to defeat them of their Debts; and therefore no such Diversity, whether the Lands descend, or are devised.

(6.) (b) Pecuniary Legatees shall abate in Proportion, where (c) the Estate falls short to pay them all. 2 Ch. c. 25. Although it be directed by the Will, that one should be paid in the first (d) Place. Vern. 31. And there is the same Equity in case of younger Children, who are to have Portions raised out of a real Estate; as where the Father conveyed his Estate to Trustees to make a Provision of 100 l. a-piece for his (e) younger Children, to be raised and paid according to their Seniority; yet if there shall happen a Deficiency, the Eldest shall not have more, and the Youngest less, but they shall all be paid in Average. Vern. 335.

(b) But Specifick Legatees shall not abate. Vern. 31. S. P. 2 Salk. 416. What is a specifick Legacy, vide 2 Ch. c. 25. (c) But if the Legacy of any one lies on a particular Fund by it self, and others upon another Fund, each must bear his own Loss. 2 Ch. c. 132.

(d) The Lord Keeper North seemed of another Opinion, as to this Point. 2 Ch. c. 132. (e) It being said generally for younger Children; the Children that he had afterwards by a second Wife came in for a Share. Vern. 335. But Money left in Trust for the Children of J. S. shall be

be for the Benefit only of the Children he then had, and not those born afterwards. 2 Ch. Rep. 69. And where the personal Estate was given by Will among his then Children by Name, and afterwards the Father conveyed his real Estate to Trustees, to be divided among all his Children; a Child born after the Will, but before the Conveyance, had a Share of the real Estate, but not of the personal. 2 Ch. Rep. 210.

(7.) One Legatee shall compel another to refund, where the Assets become (a) deficient, though there be no (b) Provision made for refunding. *Vern.* 94.

(a) There cannot be a Deficiency of Assets, so

as to compel one Legatee to refund to another, where the Executor is liable to pay the Legacy, except he be insolvent; (where the Executor is not liable, can only be where he has legally discharged himself. *Vide post. c. 9. & Max. 7. c. 4.*) for if an Executor pays one Legatee, and afterwards there appears not Assets to pay the rest; yet the Legatee who is paid, shall not refund; but the Executor shall pay the others out of his own Purse, in Proportion to the Assets, which came to his Hands. 1 Ch. Rep. 133. S. P. 2 Ch. c. 132. (Whether the Executor can compel the Legatee to refund to him. *Vide post. c. 9.*) But in such Case if the Executor is Insolvent, the Legatee that is paid must refund in Proportion, though the Legacy was paid as a Marriage-Portion; and though the Assets become deficient by Accident, bad Security, or the like. 1 Ch. Rep. 136, 148. and that the Executor must appear to be insolvent, before one Legatee can compel another to refund, appears from the Executors being always made a Party to the Bill. 1 Ch. c. 136, 248. 2 Vent. 360. (b) If a Suit for a Legacy be in the Ecclesiastical Court, they make the Legatee give Security, because when the Legacy is paid, they cannot restore, &c. but the Court of Chancery decrees a Legacy without Security; (unless in Case of Poverty, or the like) for the Court can reach the Legatee again if there be Cause. 2 Ch. c. 9.

(c) But one Creditor shall not make another refund. 2 Ch. c. 54. (in Margin).

As where the Executor paid a Debt upon simple Contract, he shall not refund to a Creditor of an higher Nature. 2 Ventr. 360.

for the Creditor by simple Contract is not a Gainer by having his Debt paid him.

(d) Much rather therefore shall

not a bare Assent or Release of the Executor, bind the Creditor. *Vern.* 455. (e) Here also the Deficiency can arise only from the Insolvency of the Executor; for if the Executor be solvent, the Creditor may recover at Law, and has no need to make the Legatees refund; and in all the Cases of such refunding, the Executor is made a Party. 1 Ch. c. 256. 2 Vent. 360. where it was so decreed, principally upon the Insolvency of the Executor.

(8.) Creditors shall make (c) Legatees (d) refund where the Assets become (e) deficient, though there be no Provision made for refunding. *Vern.* 94. A Legatee shall refund against the Creditor of the first Testator, that can charge an Executor only in Equity, viz. Upon a Wasting by the first Executor; 2 Vent. 360. as A. being indebted unto B. makes C. his Executor, C. wastes the Estate, and dies, and makes D. his Executor, and by his Will devises several Legacies; D. pays the Legacies; B. exhibits his Bill against D. the Executor of C. for his Debt due from the first Testator; and against the Legatees in the Will of C. to compel them to refund their Legacies, there being not now sufficient Assets of the first Testator. Decreed that the Legatees should refund. *Vern.* 162.

(9.) It was admitted by the Court, that if Executors pay out the Assets in Legacies, and afterwards Debts appear, of which they had no (a) Notice at the Time of Payment of the Legacies, they by Bill in Equity may compel the Legatees to refund. 1 Ch. c. 136.

(a) If the Executor had Notice, without all Doubt he shall not compel the Legatee to

refund. As where there was a Suit for the Goods specifically devised, and pending that Suit, the Executor delivered the Goods to the Legatee, he could not make him refund. 2 Ch. c. 9. But even where there is not Notice, the Cases seem more strong, that Equity will not compel the Legatee to refund; for where the Creditor and Executor joined in a Suit to compel a Legatee to refund, the Bill was dismissed, because the Executor was Plaintiff, who should not be admitted to undo his own Assent, 2 Ventr. 360. and the Case of *Noell and Robinson* is more strong; where the Executor was Defendant to a Bill brought against him by the Legatees, for an Account of the Profits of a Plantation devised to them; to which Devise the Defendant, the Executor, had assented, only by reserving the Rent to himself in Trust for the Plaintiffs, on a Lease made by him of the Plantation; and though at the Time of such Devise, he apprehended there was Assets sufficient to pay the Testator's Debts, which proved deficient wholly by the Accident of some Merchants breaking; and he had actually sold the Plantation to pay the Testator's Debts; yet it was decreed, that the Executor and Purchaser should account; for an Executor's Assent shall be binding to himself; and where he has assented to a Legacy, he shall never afterwards avoid it; though a Creditor in such Case shall compel the Legatee to refund. 2 Ch. Rep. 248. S. C. 2 Ch. c. 145. Vern. 90, 453, 460. and Note, by all the Cases precedent it appears, that this Equity of Equality to take away one Man's Gain to make up another's Loss, holds only, where such Loss is occasioned by the Act of a third Person, or by Accident, and not by the Act or Laches of the Party himself, as this Case of the Executor is, who ought to have taken Security for the Refunding. 2 Ch. c. 132. or had a Decree for his Indemnity. But where an Executor is obliged by Law to give Security for Payment of Legacies, and afterwards the Assets become deficient by Accident, the Security shall be made use of no further, than to make good the Testator's Estate, over and above such Losses by Accident. Vide Max. 7. c. 4. And where an Executor under a revoked Will, having no Notice of the Revocation, pays Legacies, and after the Revocation is proved, he shall be allowed those Legacies. Vide Max. 7. c. 5.

(10.) A. agrees with B. the Lord of the Manor, to purchase a Copyhold, and pays 200 l. in Part, and was to pay the Remainder in three Months, and then to name his Lives and take up his Copy. A Court is held, the three Months expire, and B. dies suddenly; and the Manor comes to one, who was not bound by the Agreement. The Executor of B. was decreed to refund the Money. Vern. 472.

(11.) A Debtor upon Bond and simple Contract, makes a Conveyance of Lands upon Trust for the Payment of his Debts. The Debts upon simple Contract, shall be paid in Proportion with the Debts by

(b) Bond. 1 Ch. c. 32. and though they are convey'd

(b) But Debts which in their own Nature affect

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to

the Lands shall be paid according to their Precedency or Superiority at Law. 1 Ch. c. 32. And where a Man, indebted by several Mortgages of the Lands made thrice over, and also by

Judgments,

Judgments,
Bonds, and
simple Con-
tract, con-
vey'd the
Lands for
Payment of
his Debts;
although it
was insist-
ed, that all
the Judg-
ments and

Mortgages, made subsequent to the first Mortgage, were not Incumbrances upon the Lands, because all the Estate in Law was in the first Mortgagee; and therefore the subsequent Mortgages and Judgments ought to be paid in Average with the Bond, and simple Contract Creditors; yet on Account of the Confusion it would make, and the Impracticableness of a Payment in such Method, it was decreed, that the real Securities should be first paid, and then the Bonds and simple Contract Creditors should be paid in Average. *Vern.* 102. (a) Note here a Difference, where the Lands are devised, to the Executor or to another; for if they are devised to the Executor, they become legal Assets, and then Debts must be paid according to their Precedency or Superiority at Law. *Vern.* 63. Vide *Max.* 14. c. 18. So *Quer*, What are adjudged Assets in Equity to pay Debts, which is too large to be here inserted.

(b) Which is
usually a
third Part.
1 Ch. c. 271.
but if he in
Remainder
does not
come in the
Life of the

Tenant for Life, he shall have a Decree against his Executor, in Proportion only to the Time the Tenant for Life lived. *Vern.* 404. (c) And if it be a Mortgage, will make him keep down the Interest.

to some of the Creditors; yet they shall not give themselves a Preference. *2 Ch. c. 54.* there is the same Equity, where the Lands are (a) devised. *1 Ch. c. 248.* for a Debt without Specialty, is as much a Debt *Jure Naturali*, and in Conscience, as a Debt by Specialty; and therefore *there shall be Equality where Conscience is the Judge.*

(12.) If Tenant in Fee mortgages his Estate, or charges it with a Sum of Money; and devises it to one for Life, Remainder to another in Fee: Equity will compel the Tenant for Life, to bear his (b) Proportion of the Mortgage or Charge. *1 Ch. c. 223, 224.* And if it be a Rent-Charge, Equity will make the Tenant for Life pay the (c) Arrears, that all may not fall upon the Remainder-Man. *1 Ch. c. 223.*

(13.) The Husband upon his Marriage agreed to settle particular Lands to the Use of himself for Life, Remainder to his Wife for Life, Remainder to the Issue of the Marriage in Tail; and afterwards aliened and sold Part of those Lands; the Wife obtained a Decree to have the full Value of the Estate she was to have for her Life, supplied and made good to her out of the Lands remaining unfold, and that the Inheritance of those Lands should be subjected thereto. But the Decree was reversed; for the Jointress and the Children are equally Purchasers, and the Wife must not have all, and leave nothing for the Children,

Children, but they must bear the Loss in Proportion ; and so in any Case, where the Issue and Jointress Claim by the same Settlement, if there be a prior Incumbrance, the Jointress shall contribute, and bear her Proportion, and not hold over and lay the whole Burthen upon the Heir. *Vern.* 440.

(14.) Sureties shall be compelled in Equity to contribute towards the Payment of a Joint Bond. *Toth.* 41. As where three were bound as Sureties in a Recognizance ; one of the Sureties was sued at Law, another of the Sureties and the Principal being insolvent, he that was sued brought his Bill against the other Surety, for a Contribution ; and he was decreed to pay a Moie-ty. 1 *Ch. c.* 246. *S. P.* 1 *Ch. Rep.* 35, 120, 150.

(15.) Lessee of divers Lands pays an entire Rent ; a Right of Common is recovered by the Inhabitants of the Town, in Part of the Lands ; this is no Eviction of the Land, and so no Apportionment can be at Law. But Equity will (a) apportion the Rent. 1 *Ch. c.* 32.

(a) But it appearing, that, notwithstanding the Right of Common, the Lands were worth the Rent and better, the Court would not do it. 1 *Ch. c.* 32.

(16.) If a Man grant a Rent-charge out of all his Lands, and afterwards selleth them by Parcels to divers Persons, and the Grantee of the Rent will from Time to Time levy the whole Rent upon one of the Purchasers only, he shall be eased in Equity by a Contribution from the Rest of the (b) Purchasers ; and the Grantee shall be restrained to charge the same upon him (c) only. *Car. Rep.* 3.

(b) But he must make all the rest of the Purchasers and Tenants,

Parties. *Car. Rep.* 33 Though in the Case of a Charity, for which a Rent-charge was devised, the Court would not allow the Objection, that all the Tertenants were not Parties ; for the Charity shall not be put to that Difficulty ; but the Tertenants may, if they seek a Contribution, undertake to make them Parties to the Information, or help themselves by such Course as they think fit. 1 *Salk.* 163. (c) But where the Wife had a Rent-charge, and the Husband devised Part of the Lands to her, Equity would not apportion the Rent-charge ; for then she would have had no Benefit by the Devise. *Vern.* 347.

(17.) If you sue in Chancery an Executor of one Obligor, to discover Assets, you must make all the (a) Ob-

(a) A *Quer'*, (a) Obligors Parties, that the Charge may be equal.
is made,
whether you 2 *Vent.* 348.
may not sue

the Principal, and leave out them that are bound only as Sureties? But it is clear, that if a Judgment be had at Law against one Obligor, you may sue the Executor of him alone, to discover Assets, &c. Because the Bond is drowned in the Judgment. 2 *Vent.* 348.

(18.) Two Executors being decreed to pay Legacies and Debts; the one paying, the other shall upon a Bill be compelled to pay the Moiety and Costs. *Totb.* 29.

(19.) The Advantage of Survivorship is against Equity; as where two Persons advanced the Mortgage-Money; and the Deed was made to them and their Heirs; the one died before Payment, yet his Executor was relieved. 1 *Ch. Rep.* 58. So if two Joint Purchasers pay Share and Share alike for a Purchase; and one dies, his Representative shall be relieved for a Moiety of the Purchase. *Vern.* 361. So it is as to a Stock in Trade, the Plaintiff, Administrator of one Partner, sued the Copartner for an Account of the Intestate's Share, which was accordingly decreed. 1 *Ch.*

(b) Note; The Lord Keeper said, that if the Farm had been taken jointly by them, and proved a good Bargain, there the Survivor should have had the Benefit. *Vern.* 217. Vide *Winch* 59. Where it was agreed, that if a Court of Equity, will decree against the surviving Jointenant for the Heir

Rep. 261. So where two Persons jointly (b) stock'd a Farm, and occupied it as Jointenants; though the Deceased was informed what the Consequence of Law was in Case he should die; and that he thereupon replied, he was content the Stock should survive; yet his Executor was relieved; and *per Lord Keeper*, though it is common for Traders, in Articles of Copartnership, to provide against Survivorship; yet that is more than is necessary: And he took the Distinction to be, where two become Jointenants, or jointly interested in a Thing by Way of (c) Gift or the like; (d) there the same shall be subject to all the Consequences of Law: But as to a joint Undertaking in the Way of Trade or the like, it is otherwise. *Vern.* 217.

of the Deceased, for a Moiety of the Lands; except there was an Agreement in the Life of the Parties, that there should be no Survivorship; a Prohibition shall be granted. (c) And accordingly it has been decreed, that if the Testator devises the Residue of his Estate to his two Executors, or make several Men Executors, the Survivor shall carry all. 2 *Ch. c.* 64. *S. P.* 1 *Ch. c.* 238. decreed *contra*, but to the Dissatisfaction of the Bar; though Note Lord Chancellor's Expression, why the Survivor shall carry all, *because the Judges will have it so.* 2 *Ch. c.* 63. *S. P. Vern.* 482. and Lord Chancellor's Opinion, that it would be the same, if one of the Executors had possessed himself of the Moiety of the Goods, and had died. (d) If A. de-

vifes

vifes the Surplus of his Estate to his two Nephews, equally to be divided between them, and appoints his Executor to lay it out for the Benefit of his said Nephews: one of the Nephews died in the Testator's Life time, the surviving Nephew shall have the whole: the latter Words, by which the Surplus is appointed to be laid out for the Benefit of the Nephews, being Joint. *Vern.* 425.

(20.) Equity will in (a) many Cases controul the unequal Distribution of a Trustee or Guardian, though he had exprefs Power to distribute, as he thought fit; as the Devise of a personal Estate was in these Words: *I do entrust my Wife with the same, during the Time she shall continue my Widow; and in case she shall re-marry, I do will and desire her, to give unto my Children according as she shall think fit*: She married again, and then by Writing appointed very unequally to the Children; the Court (b) set aside the Distribution. *2 Ch. c. 228.* Devise to his Wife of his personal Estate, upon Trust and Confidence, *that she would not dispose thereof, but for the Benefit of her Children*; she by Will gave one but 5 s. and all the Rest to another; the Court set aside so unequal a Distribution. *Vern.* 66. The Will directed that his Lands should descend and come amongst his Daughters, in such Shares and Proportions, *as his Wife by Deed in Writing should direct and appoint*; the Wife makes an unequal Distribution; the Court at first declared the Circumstances must be very strong, as something of Bribery and Corruption, that would take away this Power from the Wife, by the exprefs Words of the Will; but afterwards declared, the Case was proper and relievable in Equity; for as she allowed the

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Executor to reward such of his Children and Grand children, as they should demerit, and as the Executor should think fit, and not to an absolute fixed Trust, to create a Certainty of Right or Interest as to any certain Proportion in any of the Children or Grand-children; and therefore as to whatever of the real Estate was disposed by the Executor in his Life-time, or given by his Will, the Bill, which sought to set aside that Distribution, was dismissed. *2 Ch. Rep.* 141. The Testator gave the Residue of his personal Estate, to and amongst his Kindred according to their most Need, to be distributed among them by his Executor; and desired that a Care and Regard should be had to *J. S.* the Court decreed that the Executor ought chiefly to consider those that have most Need, that so they that have more Need may have more than they that have less; and as to *J. S.* who was particularly recommended to the Executor, the Court declared he had a Power, and ordered him to give him somewhat considerably out of the Residue of the said Estate; and the Master was to see Right done. *2 Ch. Rep.* 146. (b) But Note; one main Reason was, that the Wife had married a second Husband, and being under Coverture, her Distribution might be influenced by her Husband's Authority. *Vern.* 415.

(a) Devise of
any Goods
and personal
Estate to
Trustee upon
Trust to give
my Children
and Grand-
children ac-
cording to
their Deme-
rits, the
Trustee
gives all to
one; the
Court would
not relieve
against this
unequal Di-
tribution,
declaring
the Trustee
to be the
Judge. *1 Ch.
c. 309.* The
Testator de-
vised his real
and personal
Estate to his
Executor in
Trust, there-
with to re-
ward his
Children and
Grand-child-
ren accord-
ing to their
Demerit;
the Court
declared
that this a-
mounted to
a general
Trust in the

Plaintiff but a small Proportion, she might for any causeless Displeasure, have allotted her but one barren Acre only, and in such a Case the Court would have had a Jurisdiction, and therefore here also: And declared it was discretionary whether it would relieve or not, and would be attended with Precedents. *Vern.* 355, 414.

(21.) If Goods are thrown over board in Strefs of Weather, or in Danger or just Fear of Enemy, in order to (a) save the Ship and the rest of the Cargo: That which is saved shall contribute to a Reparation of that which is lost, and the Owners of the Ship shall be Contributors in Proportion. *Sh. P. C.* 19.

(a) So that the Loss of Goods thrown over-board, &c. must contribute to the saving of the

other Goods, else this Rule of Average will not hold; and therefore where the Ship, being laden with Oils belonging to the Plaintiff, and with Silks belonging to the Defendant, was pursued into an Harbour by Enemies; the Master ordered the Silks on Shore, being the more valuable Commodity, though they lay under the Oils, and took up a great deal of Time to get at them; the Ship and the Oils in her being taken, the Owner of the Oils demanded a Contribution from the Owners of the Silks; insisting that the Salvage of the Silk (which had otherwise been lost) deprived the Plaintiff of the same Opportunity for the Salvage of his Oils, and that in such Adventures, as the Danger is common, so ought the Loss and Damage to be common and equal. But the Bill was dismissed, for that the Loss of the Oils did not actually save the Silks, neither did the Saving of the Silks lose the Oils; for if the Silk had not been saved, the Oils had been lost; for they were so bulky that they could not easily be removed without further Time; and if Part only be saved, it is to the Advantage of the Owner. So in Case of Damage to Goods within the Vessel, other Goods shall not be contributory, but the Owner must endure his own Loss. *Sh. P. C.* 18.

Maxim IV.

It is Equity, that should make Satisfaction, Which received the Benefit.

(1.) **T**HE Heir being sued, and having paid a Debt of his Ancestor by Bond; it was decreed the Executor should reimburse him, as far as there were personal Assets come to his Hands. 1 Ch. c. 74. and Lord Chancellor declared, that the personal Estate in the (a) Hands of the Executor shall be employ'd in Ease of the Heir, by whatever Means the Heir became (b) indebted (c) as Heir, 2 Ch. c. 5. as if the Ancestor mortgages the Estate, the (d) Mortgage-Debt shall be paid out of the personal Estate. 1 Ch. c. 271. S. P. 2 Ch. c. 5. Although there be no (e) Covenant in the Deed for the Payment of the Mortgage-Money, Vern. 436. S. P. 2 Salk. 449. (f) *for the personal Estate received the Benefit, by contracting the Debt, and therefore should make Satisfaction.*

(a) If the personal Estate be not expressly devised to the Executor; it is then in his Hands, as Executor, and consequently shall be applied in Ease of the real Estate; as where a Man conveyed his Lands to Trustees

to pay his Debts, and made his Wife Executrix; but did not thereby in express Terms give her the personal Estate; it was decreed, it should be applied in Ease of the real. 1 Ch. c. 297. So if the real Estate is devised for Payment of Debts, and the Residue of the personal Estate after Debts paid, be given to the Executor, the personal Estate shall notwithstanding, be applied to the Payment of the Debts. 2 Vent. 349. (b) If it be a Duty or Charge in Equity, the personal Estate shall be first applied. 2 Ch. c. 84. (c) Or if the real Estate be charged with the Payment of Legacies, as conveyed or devised to Trustees for Payment of Legacies; yet the personal Estate shall be first applied, as in Case of Debts. 1 Ch. c. 297. S. P. 2 Vent. 349. *Although Note; In this Case of Legacies the personal Estate was never benefited: But this Case is governed by another Rule, that all Legacies shall be paid out of the personal Estate.* (d) But where the Ancestor purchased the Equity of Redemption, which descended to the Heir; there the Mortgage-Debt was not paid out of the personal Estate. Vern. 37. S. P. 2 Salk 449. *for by the Purchase of the Equity of Redemption, the personal Estate is not increased but diminished.* (e) This was formerly decreed otherwise; that in Case, there was not a Covenant in the Deed for the Payment of the Mortgage-Money and Interest, the Administratrix was not obliged to discharge the same. 1 Ch. Rep. 275. (f) *Note; Debts shall be paid out of the personal Estate; tho' thereby it is lessened to the Prejudice of a Widow, who claims a Third by the Custom. 2 Ch. c. 84. S. C. Vern. 36. but Legacies shall not be paid out of the personal Estate, to the Prejudice of such a Widow, 2 Ch. c. 85. for that would be to decree, that the Husband could give away his Widow's customary Share.*

(2.) In

Maxims of Equity.

(2.) In the Case of *Cornish* and *Mew* the Court took Difference, that, though in Case of an Heir, Debts affecting the real Estate, shall be paid out of personal Assets, yet it shall not be so, in the Case of a Devisee. 1 *Ch. c.* 271. But that Difference was rejected in the Case of *Pochley* and *Pochley*; where Lord Chancellor declared, that not only the Heir, in case he be charged with the Debts of his Ancestor, but also the Devisee of the Lands shall be unburthened of the Debt, lying upon the Lands, by the personal Estate in the Hands of Executor or Administrator; and so shall the Devisee of a Mortgage, 2 *Ch. c.* 84. and that not only he who is *heres factus*, shall pray in Aid of the personal Estate to discharge the real, but even an ordinary Devisee shall have that Benefit. *S. C. Vern.* 36.

(3.) The Testator held the Lands subject to a certain Rent, and let it run in Arrear; though his Person was not liable at Law, to the Payment of the Rent, yet it was decreed, the Executor, and not the present Tertenant, should pay the Arrears, as far as he had Assets, because by not paying the Arrears, the Testator's personal Estate was augmented. 1 *Ch. c.* 121.

(4.) The Question was, how far the second Husband should be charged of his own Estate, for a *Devastavit* or Breach of Trust committed by the Wife and her first Husband; and *per Cur.* where there is a Bond, there is a *Lien* by Deed, and so the second Husband bound; but where there is only a Breach of Trust, or Debt by simple Contract, there in Equity, the Plaintiff ought to follow the (a) Estate of the Wife in the Hands of the Executor of the second Husband. *Vern.* 309.

(a) But
where there
is no such
Fund, out of

which to take Satisfaction for the Breach of Trust, the second Husband must pay it, and take his Wife chargeable with that as well as other Debts. 1 *Ch. c.* 80.

Maxim V.

It is Equity, that should have the Satisfaction, which sustained the Loss.

(1.) **A** Mortgage in Fee is forfeited; the Mortgagee dies; and the Mortgagor comes to redeem; Equity will decree (a) the Money to be paid to the Executor or Administrator. 1 Ch. c. 283. The mortgaged Lands shall be decreed to the Executor or Administrator, and not to the Heir, *Vern.* 412. and the Heir of the Mortgagee shall be compelled in Equity to convey to the Executor or Administrator. 2 Ch. c. 50. But where a Man purchased of a Mortgagee, apprehending he had an absolute Estate; the Mortgagor came to redeem; the Money was decreed to the Heir; and not to the Executor, *Vern.* 271. *for as in the first Case the personal Estate bore the Loss, it being intended only a Security for Money: So in the later Case, the real Estate bore the Loss, it being intended an absolute Purchase.*

(a) This was for a long Time an unsettled Point; for where there was neither Bond nor covenant to pay the Mortgage; nor no Defect of Assets to pay Debts; & the Condition was to pay to the Heirs of the Mortgagee; or to the Heirs or Executors, &c. in these Cases, the Court many

Times doubted, and sometimes decreed the Mortgage-Money to the Heir. *Vide* 1 Ch. Rep. 183. 2 Ch. Rep. 155, 242. 1 Ch. c. 88. *Vern.* 170. But all these Doubts are now ousted; and the Mortgage-Money in all Cases whatsoever, shall be paid to the Executor or Administrator. *Vide* 1 Ch. c. 283. 2 Ch. c. 50, 51, 220. 2 Ventr. 348, 351. *Vern.* 412.

(2.) A Purchaser takes the Fee in his own, and an Assignment of a Mortgage-Term, in the Name of Trustees; though it is not mentioned to attend the Inheritance, Equity will decree it to be assigned to the Heir. *Vern.* 1. And where such Purchaser made a Will of those Lands, but not duly executed by the Statute, so as to pass the Lands) and devised them from the Heir at Law, yet the Fee descending to the Heir, he was decreed to the Term, 2 Ch. c. 49. And there is the

G

same

(a) Where it is not mentioned to attend the Inheritance, there seems some Doubt whether it shall not go to the Executor to pay Debts; and this, altho' the Term is in Trustees, and so not Assets at Law. *Vide 2 Ch. c. 49, 152. Vern. 1, 188, 341.* But even in those Cases, where it is adjudged to be Assets, it is admitted, that after the Payment of Debts, the Surplus shall go to the Heir.

same Equity, if the Purchaser takes the (a) Mortgage-term in his own Name, and the Inheritance in Trustees; it shall go to the Heir, though not mentioned to attend the Inheritance. *2 Ch. c. 156.* And it is not material, whether the Fee or the Term was purchased first. *2 Ch. c. 156. for the Inheritance sustains the Loss, by keeping the Term on foot, and therefore should have it in Satisfaction.*

(3.) When Lands are appointed or convey'd to pay Debts, the Heir is intitled to have the Lands after the Debts paid. *2 Ch. c. 115.* And if a Man makes a Lease, or devises an (b) Estate for Years (he being seised of an Estate of Inheritance) for Payment of Debts; if the Profits of the Land surmount the Debts, all that remains shall go to the Heir, tho' not so exprest; and albeit it be in the Case of an Executor, *2 Ventr. 359.* and in all Cases where a Term for Years is created for any particular Purpose, as to raise Portions, &c. the Overplus shall go to the Heir. *1 Salk. 154.*

(b) The Testator's Will was, that his Executor should take the Profits of his Lands (of Inheritance) for fifteen Years, in Trust to pay his Debts; and bequeaths the rest of his Goods and Chattels to his Executor; the Debts are paid, and there is an Overplus of the fifteen Years, besides what was sufficient to pay the same; the Court decreed the Residue of the Term to the Executor: But a *Quer.* is made by the Reporter. *1 Ch. c. 98.*

(4.) A Guardian of an Infant having a considerable Sum of Money in his Hands, that was raised out of the Infant's Estate, (c) lays it out in a Purchase for the Infant; if when he came of Age he should agree thereto, and allow the Guardian that Money on Account; the Infant dies under Age; the Question was whether the Heir of the Infant should have this Estate; or the Trustees to account to the Administrator for the Money; the Court decreed the latter. *Vern. 403, 435, S. C. 2 Ch. Rep. 377.*

(c) But if the Guardian had come into Equity, and shewn that it would be for the Benefit of the Infant to have had this Money so laid out, the Court would have decreed it; and tho' the Infant had died under Age, the Court would have maintained its own Decree, and then it would have gone to the Heir. *Vern. 436.*

(5.) A Man purchased a Copyhold for three Lives, viz. of himself, and his two Brothers, and dies; his Son enjoy'd the Lands, and died; and the Administratrix of the Son being in Possession, the Uncles disturbed her; she brought her Bill to be relieved, as having the Title of the first Taker, who paid the Fine; which was decreed. *Vern.* 415.

(6.) Coparceners make a Partition by Consent; and the Lands of the one being of greater Value than the Lands allotted to the other, until an Estate for Life fell in; it was agreed, that that Coparcener who had the least Share, should have a Rent of 20*l.* per Ann. during the Life of the Tenant for Life, to make her Share equal; this Rent shall go to the (a) Heir. *Vern.*

133.

his Executors and Administrators to pay the Rent; the Court decreed the Bond to the Executor; because the Obligor had his Election to pay the Rent, or forfeit the Bond. *Vern.* 133.

(a) But a Bond being given to that Coparcener,

(7.) The Plaintiff being Part-owner of a Ship, refused to join with his Copartners to fit her out to Sea; and thereupon the other Partners complained in the Admiralty and gave (b) Security, that if she perished in the Voyage, to make good to the Plaintiff his Share; the Ship returned, and the Plaintiff sued in Equity to have his Share of the Profits of the Voyage; but the Bill was dismissed; for they who must have sustained the whole Loss, in case the Ship had miscarried, ought to have the whole Benefit, now she has returned safe. But if they had not given Security in the Admiralty, then the Bill would have been proper; for then he must have borne his equal Share of the Loss, and therefore ought to have his Share of the Gain. 2 Ch. c. 36. S. C. *Vern.*

297.

they had such a Power; but the Matter being of Consequence, and never yet determin'd, they granted a Prohibition, and directed them to declare according to their Suggestion. 6 Mod. 162.

(b) Upon a Motion for a Prohibition to a Libel against such Security, suggesting that the Security was given upon Land, and that all Matter of Property is to be ordered by the Common Law only; the Court seemed strongly inclined that

(8.) The

Maxims of Equity.

(8.) The Factor entered not the Goods in the Custom Books of a (a) foreign King; and so the Duty was not paid: On an Account between the Employer and the Factor, the Factor insisted on an Allowance for the Duty, which was decreed; for if the Non-payment of the Duty had been discovered, the principal Freight had been forfeited, and the Factor must have answered it to the Employer; and as he run the Hazard wholly, he ought to have the Benefit, 1 *Ch. c.* 25. and upon a Bill brought by the Factor to have an Allowance for such Customs, it was decreed accordingly. 1 *Ch. c.* 76.

(a) But in the Case of the Duty not being paid to our own King, where due to him; the Court declared, that the Course of Merchants, that the Factors should have the Benefit of the Customs themselves, and not the Principals, because the Penalty would fall upon the Factor, if discovered, could not be called a good Custom, being founded upon Fraud; and on a Bill brought by the Employer to have an Account, the Factor was ordered to answer touching the Discovery of the Payment of the Customs. 1 *Ch. c.* 30.

Maxim VI.

Equity suffers not a (b) Right to be Without a Remedy.

(a) Note; The Rights here intended, are those which the Law acknowledges to be such; and never gives Judgment against them, tho' it cannot give a Remedy for them; and not equitable Rights, for which Equity gives a Remedy in the very Creation of them.

(1.) **A** Court of Equity will compel the Lord of a Manor, to admit the Tenant. *Toth.* 2, 3. As, if the Lord will not hold a Court, Equity will compel him, *Car. Rep.* 4. for an Action on the Case will not lie against the Lord; and there is no Remedy but in Chancery. *Cro. Jac.* 368. *S. C.* 2 *Bulst.* 336. So if an erroneous Judgment be given in a Copyhold-Court, in a *Formedon*, or the like, a Bill may be exhibited in Chancery to (c) reverse it. 1 *Rol.* 373. *pl.* 2. *Lane* (d) 98.

(c) Or to compel the Lord to receive a *Plaint* or *Petition* to reverse it; but where such Bill was brought to reverse a common *Recovery*, under which the Defendant had purchased, the Court would give no Assistance. 2 *Ch. Rep.* 387. *S. C.* *Vern.* 367. for Equity ought rather to supply a Defect therein, than assist in the annulling it. *Sh. P. C.* 67. (d) Altho' the King was Lord of the Manor.

(2.) If the Lord of the Manor will exact Fines arbitrary, Equity will restrain him. *Car. Rep.* 4. *S. P. Dy.* 164. As in case of a Tenant-right Estate, where the Fine is to be paid on the Death of the Lord, or the Death of the Tenant, or upon an Alienation; the Lord was compelled to take a moderate Year's Value. *1 Ch. Rep.* 34. *S. P.* *1 Ch. Rep.* 96. And the Estates held by the Tenants being for 99 Years renewable, and the Fine being arbitrary at the Will of the Lord, the Court compelled him to renew upon Payment of Fines of two Year's Value. *2 Ch. Rep.* 134. *for the Lord might exact a Fine to the Value of the Estate, and so the Tenant lose his Estate, without this Remedy in Equity.*

(3.) A Rent-seck is (a) granted; Equity will decree (b) Seisin to be given, and the (c) Rent to be paid to the Grantee. *1 Rol.* 378. *pl.* 22. *S. P.* *Mo.* 805. *1 Ch. c.* 147.

(a) *Vide*
1 Rol. 378.
pl. 21, 22. A
Difference
where the
Rent com-
mences by
Grant, and

where by Devise; that in Case of a Grant, Equity will not decree Seisin; and *1 Rol.* 375. *pl.* 3. where a Man had a Remedy by Distress, and by his own Act destroy'd his Power of distraining; Equity would not relieve him. (b) Here *Note* a Difference; that where there is no Remedy at Law, (as in this Case of a Rent-seck) Equity will grant one; but where there is one, Equity will not grant a further one, tho' that at Law is not available: As where an Annuity was granted out of a Rectory; the Glebe was but forty Shillings *per Ann.* and the Tithes not being liable to a Distress; there was no Remedy: Equity decreed the whole Rectory to be liable to pay the Annuity. *1 Ch. c.* 79. So the Bill was for Payment of a Rent of five Shillings *per Ann.* it being proved that the Rent had been constantly paid, 'till about twelve Years last past, and no Deed appearing to shew the Nature of the Rent, it was decreed to be paid for the future, whereby the Person of the Defendant was charged. *1 Ch. c.* 120. a like Bill and like Decree. *Vern.* 359. But where the Bill set forth, that the Plaintiff had a Rent-charge upon the Lands; but that the Defendant turned all the Land to Tillage, and left no Stock on the Ground for the Plaintiff's Distress, and therefore pray'd Payment: The Court declared, that unless there appeared a Fraud to hinder the Plaintiff of his Distress, he could not have any Relief here. *1 Ch. c.* 144. So in a like Case it was demurred, for that the Plaintiff had Seisin, and might bring his *Affize*, and that Equity ought not to charge the Person of the Defendant, where there was another Remedy at Law; the Demurrer was allowed. *1 Ch. c.* 184. (c) This seems doubtful; for in the Case of *Ferris* and *Newly* cited *1 Ch. c.* 147. it appears, that only Seisin of the Rent was granted, *S. P.* *1 Ch. c.* 184. and *Note*, that in all the Cases before mentioned where the Court has decreed Payment, and thereby charged the Person, no other Remedy could be granted. Besides, as the Court would not charge the Person, where there was a Seisin at Law, there seems no Reason to charge it, at the same Time that it decrees Seisin to be given: Though *Vide Maxim* 9. *c.* 1. That where a Court of Equity has a Jurisdiction as to Part only, and can decree and enforce Relief as to the Whole, it will not send the Party to Law; therefore *Quer*.

(4.) A Man cannot sue in the Chancery of *Chester*, for a Thing which in Interest concerns the Chancellor there, because he cannot be his own Judge; and therefore in this Case he may sue in the Chancery in *Eng-*
H land;

Maxims of Equity.

land; for otherwise there shall be a Failure of Right.

1 *Rol.* 374. *pl.* 4. *S. C.* 12 *Co.* 113.

(5.) If a Man hath Cause to complain in Equity, of a Matter arising within the County Palatine of *Chester*, if the Defendant lives out of the County Palatine, he may be sued in the Chancery here, or otherwise there would be a Failure of Justice; for Proceedings in Equity binding the Person only, if the Person lives out of the Jurisdiction of the Chamberlain of *Chester*, there can be no Relief there. 12 *Co.* 113.

(a) So where the Wife had sued the Husband in the Ecclesiastical Court for Alimony, and it was suspected that he would go beyond Sea to avoid the Sentence; the Court granted a *Ne exeat regnum.* 2 *Ventr.* 345.

(6.) Equity gives Aid to the Jurisdiction of (a) inferior Courts. As if the Executor of a Citizen, who ought, according to the Custom of that City, to come and give Security for Orphans Portions, lives out of the Jurisdiction, Equity will compel him to come in and give Security. 1 *Ch. c.* 203.

(7.) A Purchaser of a Reversion shall compel the Lessee in *Chancery* to attorn where he hath no Means to compel him by the Common Law; for the Grantee hath no Remedy, as the (b) Conusee of a Fine, to enforce an Attornment. 1 *Rol.* 377. *pl.* 12. *S. P. Mo.* 805.

(b) Although the Conusee may compel the Tenant to attorn at Law, yet E-

quity will also compel him, 4 *Leon.* 4, 184. yet *Quer'*, and *Vide ant. c.* 3. the Notes in the Margin; that Equity will not grant a further Remedy, where there is one at Law.

Maxim VII.

Equity relieves against Accidents.

(1.) **A** Bond was given, to pay an Annuity out of the Profits of an Office, which was taken away by the Usurpers in the Grand Rebellion; the Office being revived upon the Restoration, the Obligor was sued on the Bond; but upon his Bill to be relieved, the Court decreed him only to pay the Annuity for so many Years, as the Office continued. 1 Ch. c. 72.

(2.) The Plaintiff rented an House, which was seized by the Parliament in the Grand Rebellion, and made an Hospital for Soldiers; and being sued for the Rent, exhibited his Bill to be (a) relieved; the Lord *Chancellor* took Time to advise, but declared, if he could, he would relieve the Plaintiff. 1 Ch. c. 83.

(a) Serjeant *Maynard* cited a Case, where the Plaintiff, being Tenant of

a Wharf, which by an extraordinary Flood was carried all away, brought his Bill to be relieved against paying of his Rent. But all the Relief he had, was only against the Penalty of the Bond; which was broken for Non-payment of the Rent. 1 Ch. c. 84.

(3.) An Executor having a Bond belonging to the Testator, wherein only one Person was bound, took a new Bond from the same Obligor, wherein another Person became bound for better Security; though this is a Conversion in Law, and should go to the Administrator of the Executor, and not to the Administrator *de bon' non*; yet if the Debt be lost, Equity will not charge the Executor with it, but will decree him only to assign the Security. 1 Ch. c. 74.

(4.) An Executor having sufficient Assets by Leasehold Houses, to pay ten Thousand Pounds to Infant Legatees, entered into a Recognisance, which by the Custom

(a) *Vide ant.* Custom of *London* he is (a) obliged to do, (*Vide ant.* *Max. 3. c. 9.* that if an Ex-
 ecutor or *Voluntarily* as-
 sents to a Le-
 gacy, there
 being at the
 Time of such
 Assent, suffi-
 cient Assets
 to pay the
 Legacy; yet
 if they after
 become defi-
 cient thro'
 Accident, he shall be obliged to make it good; for it was his own Folly that he took not
 Security.

Max. 6. c. 5.) for the Security of the Payment: The
 Testator's Estate was after so lessened by Eviotion of
 the Houses and by Fire, that it was doubtful whether
 what remained would be sufficient to pay the 10000 *l.*
 the Court decreed, that the Recognisance should be
 made use of no further, than to make good the Testa-
 tor's Estate, over and above the Losses by Eviotion
 and Fire. 1 *Ch. c. 190.*

(5.) An Executor under a revoked Will, but ha-
 ving no Notice of the Revocation, pays Legacies, and
 after the Revocation is proved; he shall be allowed
 those (b) Legacies. 1 *Ch. c. 126.*

(b) *Quere,* whether the
 Legatees shall be obliged to refund? *Vide Max. 3. c. 7.* that if the Assets become deficient
 through Accident, (as this Case is) one Legatee shall refund to another.

(6.) Trustee for an Infant receives 40 *l.* of the In-
 fant's Money: The Trustee is rob'd by his Servant of
 200 *l.* whereof the 40 *l.* was Part: He shall be allowed
 the 40 *l.* for he is only to keep it as his own. 2 *Ch.*
c. 2.

(7.) The Testator taking Notice in his Will that
 his Wife was *enseint*, directed that if the Child in *ven-*
tre sa mere were a Daughter, she should have 10000 *l.*
 but if a Son, that then his Executors should purchase
 100 *l. per Ann.* and settle the same on the Son, and the
 Heirs Males of his Body, with a Remainder to the
 Plaintiff: The Wife was delivered of a Son, who died
 in the Life of the Testator; then the Testator died,
 leaving his Wife *enseint* with a Daughter, who had no
 Fortune or Provision made for her. The Plaintiff ex-
 hibits his Bill to have the Lands purchased and settled
 on him; but the Court doubted, and ordered that he
 should make the Posthumous Daughter a Party; for
 if you come to have Relief in Equity, in Case of a
 Will, and there falleth out an unseen Accident, which
 if

if the Testator had seen, he would have altered his Will, there it is doubtful, whether Relief shall be granted; and though in this Case, there be no such Daughter of which the Wife was then *enseint*, and to which the Words of the Will can extend, yet here is the same in Effect: And Lord Chancellor said, *A.* having an only Daughter, devised his (a) Trustees should convey the Land to the Daughter in Fee; the Testator recovered, and after had a Son; the Daughter shall not carry the Land from the Son. 2 *Ch. c.* 16.

(a) But if the legal Estate is in the Testator, and he devises the Land, so that the Law fixeth the

Estate, Equity cannot help; as if Lands be devised in Tail, Remainder over; the Devisee dieth without Issue, *in the Life of the Testator*, the Remainder shall take Place. 2 *Ch. c.* 16.

(8.) A Sum of 120 *l.* was given with an Apprentice; and by the Articles it was provided, that if the Master died within a Year, 60 *l.* should be returned; the Master being sick when the Articles were executed, and dying within three Weeks after, the Bill was to have a greater Sum returned; and although the Parties themselves had provided against Accidents; yet it was decreed that one Hundred Guineas should be paid back. *Vern.* 460.

(9.) The Obligee in a Bond (b) loses it by Accident; the Court of (b) *Chancery* will give Relief. *Lat.* 24, 146, 148. even if the Bond was (c) voluntary; but a *Quer'* is made in the Book, 1 *Ch. c.* 77. and even against a (d) Surety. 1 *Ch. c.* 77.

(b) It is necessary in some Cases he make Oath of such Loss; as, where he seeks to be relieved up-

on the Matter of the Deed by a Decree; such an Oath is necessary. But where he only prays a Discovery, or to have the Deed produced; an Oath is not necessary; for it is not to be imagined he would exhibit a Bill in either of the later Cases, if he had the Deed, 1 *Ch. c.* 11. *S. P. Vern.* 180, 247. and the Reason given, for that you shall not translate the Jurisdiction without Oath. But *Vern.* 59. *S. P. contra.* (b) For the Court of Requests was prohibited to grant Relief in such a Case. 1 *Roll.* 375. *pl.* 1. *Lat.* 24. (c) *Quare*, *Vide Max.* 14. *c.* 17. (d) *Quare*; *Vide Max.* 14. *c.* 17.

Maxim VIII.

Equity prevents Mischief.

(1.) **I**F there be Lessee for Life, Remainder for Life, the Reversion or Remainder in Fee; and (a) the Lessee in Possession (b) wastes the Lands; though he is (c) not punishable of Waste by the Common Law, yet he shall be restrained in Chancery; for this is a particular Mischief, and though he is not punishable during the Continuance of the Remainder, yet he is (d) punishable after. 1 *Rol.* 377. *pl.* 13. *S. P. Mo.* 554. *Toth.* 61. *Car.* 26, 36. *Vern.* 23.

(a) Tenant by the Curtesy was enjoined from committing Waste. *Hardr.* 96. So of a Jointress. *Toth.* 144.

(b) Waste in Woods and Houses restrained. *Toth.* 83. So in felling Timber. 1 *Ch. Rep.* So in plowing ancient Pasture. *Toth.* 143, 144. So of ancient Meadow and Pasture. 1 *Ch. Rep.* 14, 106, 116. 2 *Ch. Rep.* 94. (c) Waste done by one who held by Covenant, and therefore not punishable by Law, yet holpen in Equity. *Toth.* 188. But here Note a Difference, where the Tenant is dispensable of Waste by the Nature of his Estate, or by express Grant; and also a Difference as to the Kind of Waste; for it appears from this Case that the first Tenant for Life shall be restrained generally, which includes all Kind of Waste. But Tenant with express Grant of *without Impeachment of Waste*, shall not be restrained from cutting Timber, 1 *Ch. Rep.* 242. or from plowing, *Vern.* 23. or from opening new Mines. 1 *Salk.* 161. But such a Tenant shall be restrained from pulling down Houses, or defacing a Seat. 2 *Ch. c.* 23. 1 *Salk.* 161. So that all Tenants for Life shall be restrained from pulling down Houses, or defacing Seats. But Tenant by express Grant of *without Impeachment of Waste*, may cut down Timber, or open new Mines, &c. though Tenant for Life, without such express Grant, shall not. (d) From this Reason here given, it should seem, that except the Tenant in Possession be punishable by Law, at some future Time, though he is not so at present, Equity will not enjoin him. But from the Cases before it appears, that though he be entirely dispensable, he shall be in some Cases restrained.

(2.) A Court of Equity hath a Jurisdiction to quiet Men in their Possessions; *per Coke*, 3 *Bulst.* 34. *S. C. Litt. Rep.* 166. 1 *Rol. Rep.* 190. As where the Party hath been in Possession three Years, and another disturbs him in such Possession; Equity will grant an (e) Injunction to quiet him in it. *Car.* 66. *S. P. Vern.* 156. So the Law Patentees had an Injunction to restrain the Defendants from proceeding in the Printing of any Law Books. 2 *Ch. c.* 67. So the Company of Stationers had an

(e) An Injunction is never granted, before the Bill filed. 4 *Inst.* 92. *S. P. Vern.* 156.

an Injunction, to stay the Books in the Custom-House, and hinder the Sale of Statute-Books printed beyond Sea, 2 *Ch. c.* 76. and where the Case requires it, Equity will grant a perpetual Injunction; as Equity granted a perpetual Injunction against proving of a Will in the Spiritual Court, it being found upon a (a) Trial to be no Will. 1 *Ch. c.* 80. So a perpetual Injunction was granted to stay the Actions at Law of several Persons, where the Right had been tried and determined by one Trial. *Vide Max. 9. c. 7.*

(a) Injunctions are not granted, except a Right appears; for otherwise the Party prohibited might re-

ceive a Prejudice, which could never be compensated, and so Equity would do a Mischief, instead of preventing one. *Vern.* 276. As upon a Motion for an Injunction to stop the Sale of *English Bibles* printed beyond Sea; the Lord *Keeper* declared, he could not grant an Injunction, but where a Man has a plain Right to be quieted in it; and directed a Trial, wherein the Patentees to be Plaintiffs, and the Defendants to admit they have sold twelve Bibles; and when the Trial is over to come back again. *Vern.* 120. So where the University of *Oxford* had a Patent for printing of Bibles; the King's Printers, being entitled under a Patent, brought a Bill to restrain them; though the Court was of Opinion, that the University could not print more than for their own Use; yet it being a Right determinable at Law, would not grant an Injunction, but directed a Trial. *Vern.* 275. And where the *East India Company* pray'd an Injunction to restrain the Defendant from trading to the *East Indies*, though the Court was far from thinking the Company's Patent void, which had been confirmed by so many Kings; yet the Validity of the Patent being triable at Law, an Injunction could not be granted, 'till it was determined there; and a Trial was directed. *Vern.* 127. *S. C.* 2 *Ch. c.* 165.

(3.) The Plaintiff in his Bill suggested, that the Defendant set up a pretended Will, whereof he was Executor, and being insolvent endeavoured to get in the Debts, the Will being contested in the Spiritual Court: The Defendant demurred, for that the Bill contained no Equity, and the Suggestion of Insolvency might be made against every Executor; but the Demurrer was over-ruled, and upon Motion ordered, that the Debtors to the Deceased's Estate, should (b) forbear to pay any Money, 'till the Matter settled in the Spiritual Court. 1 *Ch. c.* 75.

(b) Debtors, if they have the least Notice of such an Order, must take

Care, that they pay not the Money to such Executor; for where by the Decree one of the Executors was ordered to receive no more of the Testator's Estate; a Debtor, though he was no Party to the Bill, nor ever served with a Copy of the Decree, being present in Court when the Decree was pronounced, and paying a Debt due by Mortgage, to such Executor, who by Law was the Hand entitled to receive the Debt, was decreed to pay the Debt over again. *Harvey and Mountague, Vern.* 57, 122.

(4.) Where Deeds do concern as well the Title of the Reversioner, as the Title of the Tenant for Life, who

(a) But where the Plaintiff as Heir at Law brought a Bill to have the Deeds and Writings concerning the Estate, the Defendant being a Jointress, insisted that she ought not to discover or part with

her Writings, until her Jointure was confirmed; and although the Jointure was voluntary and made after Marriage, yet *per Cur'* confirm the Jointure, or you shall not see the Deeds. *Vern.* 480. *Vide Max.* 14. c. 12. the Notes there.

who is in Possession of the Deeds, it is usual to have them brought into (a) Court, for avoiding all Perils, and the indifferent Custody of them. *Car.* 25. And *per Lord Chancellor*, If Tenant for Life have a Deed, whereby the Reversion and Inheritance is in another, he may at Law detain the Deed against the Reversioner; but ordered that the Deed should be brought into Court for its safest Custody, and both Parties to have the Use of it as they have Occasion, and both Parties if they please shall have Copies attested. 2 *Ch. c.* 42.

(5.) *Enter-pleading* Bills are proper in Equity; as where the Plaintiff by his Bill shewed, that there is a Controversy between the two Defendants, for the Reversion of the Estate, which the Plaintiff holdeth for Years, and that he doth not know to which of them to pay his Rent; and pray'd, that upon Payment of his Rent into Court, he may be discharged and saved harmless from Suit and Trouble for the same Rent by the Defendants; an Injunction was granted accordingly. *Car.* 65.

(b) But the Tenant for Life shall not be obliged to pay off the whole Incumbrance. *Vide Max.* 3. c. 12.

(6.) Suits *quia timet* are proper in Equity; as where Lands chargeable with 500 *l.* to be paid to a Daughter at her Age of sixteen, were devised to the Defendant for Life, Remainder to the Defendant in Fee; the Bill was brought before the Daughter's Age of sixteen, to compel the Defendant to pay (b) off the 500 *l.* to which it was objected, that perhaps the Tenant for Life may live till the Daughter is of sixteen, and then the Daughter may enter, and so the Plaintiff not be hurt. But upon a Demurrer, the Court declared the Bill to be proper. 1 *Ch. c.* 223. So where the Surety has a Counter-bond, though he is not troubled or molested for the Debt; yet at any Time after the Money becomes payable on the original Bond, Equity will decree the Principal to discharge the Debt. *Vern.* 190.

(7.) Bills to examine Witnesses *in* (a) *perpetuam rei Memoriam*, are proper in Equity. As if a Man assumes to J. S. in Consideration that he will marry his Daughter, that he will pay him 500 l. after the Death of J. D. in this Case, because the Witnesses are old, and J. D. is as young as J. S. so that the Witnesses to prove the Promise, may die before J. D. and so J. S. will be without Remedy for his Promise; he may exhibit his Bill in Chancery, and examine Witnesses to prove it: In which he that made the Promise may join in Nature of an Examination *in perpetuam rei Memoriam*. 1 Rol. 383. pl. 1. So a Bill to perpetuate the Testimony of Witnesses to prove a (b) Will. Vern. 105. So a Bill lies to perpetuate the Testimony of Witnesses to prove a *Modus*. Vern. 185. So to prove a (c) Right of Common, (d) Vern. 308. or a Right to a (e) Way. Vern. 312.

(a) In a Bill for this Purpose, if the Plaintiff prays Relief, the Bill shall be dismissed. 2 Ventr. 366.

(b) The Testator became Lunatick; and a Bill was brought to examine Witnesses in

perpetuam rei Memoriam touching this Will; the Defendant demurred, for that it was a Bill to prove a Man's Will in his Life time, which is in Truth no Will 'till the Testator's Death; and although it was insisted, that during the Lunatick's Life, all the Witnesses to the Will, that could prove the Testator to be then *Compos Mentis*, might be dead, yet the Bill was dismissed. Vern. 105. (c) In all Cases where such a Bill may be brought, the Plaintiff must, if nothing hinders, first establish his Right at Law; as to a Bill to prove a Will, and perpetuate the Testimony of the Witnesses, the Defendant pleaded himself a Purchaser without Notice of any such Will, and insisted, that unless there had been a Verdict in Affirmance of such Will (nothing hindring the Plaintiff, but that if he had a Title, he might recover at Law) the Plaintiff ought not to be admitted to examine his Witnesses, thereby to hang a Cloud over a Purchaser's Estate; the Plea was allowed, Vern. 354. S. P. before he can bring such a Bill to prove a Right of Common, Vern. 308. or a Right to a Way, Vern. 312. or a Title to Lands. Vern. 441. But where several Actions at Law have been brought on both Sides, concerning a Right, there a Bill to have such Right tried, is proper before the Establishment of the Right at Law, being a Bill of Peace. Vide Max. 9, c. 7. (d) The Lord Keeper said, he would not allow Examination *in perpetuam rei Memoriam*, for such trivial Things as Right of Common, or for Ways or Water-courses, or at least not till after a Recovery at Law; for that the Examination costs more, than the Value of the Thing. Vern. 312. (e) In such a Bill to prove a Right to a Way, the Way must be laid in the Bill, exactly *per & trans*, as in a Declaration at Law; else it may be demurred to for Incertainty. Vern. 312.

(8.) Goods were devised to the Defendant for Life, and after his Death to the Plaintiff: The Bill was to compel the Defendant to give Security to deliver the Goods to the Plaintiff after the Defendant's Death, or the Value thereof; which was decreed accordingly. 1 Ch. Rep. 110.

(9.) The Defendant's Testator gave the Plaintiff 1000 l. to be paid at the Age of 21 Years: The Bill suggested the Defendant wasted the Estate, and pray'd

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he might give Security to pay this Legacy when due, which was decreed accordingly. 1 *Ch. c.* 121.

(10.) An Apprentice, after he is out of his Time, may exhibit a Bill to oblige his Master to sue the Covenants in the Indentures within a certain Time, (*viz.* a Year) or else to deliver up the Indentures; for else the Master might stay his Action as long as he pleased, and till the Apprentice's Witnesses were dead. 1 *Ch. c.* 70.

(11.) A Common that has been inclosed for thirty Years, shall not afterwards be thrown open, *Vern.* 32. and Equity will bind the Right of a Stranger to prevent such a publick Mischief; as there being an Agreement between the Plaintiff and the Parson, to inclose a Common, in which the Parson had some Glebe, for which the Plaintiff was to give him as good; the Court decreed the Agreement (a) and Inclosure, and that the Successors of the Parson should be bound thereby.

(a) It seems there ought to be a Commission, to examine the Value and Quantity of both Lands, that the Church may receive no Prejudice.

1 *Ch. Rep.* 41.

(b) And a Commission was awarded to set out each Person's Title.

1 *Ch. c.* 48.

1 *Ch. Rep.* 41. So where there was an Agreement for an Inclosure, but all that claimed Common, were not Parties to it: Although it was insisted, that to decree that Agreement, would be to do a manifest Wrong; it was decreed nevertheless, that the Agreement for the (b) Inclosure should be performed; and that if any, that had Interest, were not Parties to the Agreement, they could not be bound, and so at no Prejudice: But however, it should not be in the Power of one or two wilful Persons to oppose a publick Good. 1 *Ch. c.* 48.

So where there was a Decree for an Inclosure twenty Years since, to which the Husband agreed; but the Wife having an Estate within the Manor, and her Husband's Agreement not in Strictness binding her, she would now disturb the Inclosure; it being proved, that she was (c) benefited by the Inclosure, the Court decreed it should stand. *Vern.* 456.

(c) But where it was not charged in the Bill,

that the Defendant would be benefited by such Inclosure, nor charged that there was any Agreement for an Inclosure; on a Demurrer for that Reason, the Bill to compel the only Freeholder in the Manor to consent to an Inclosure, was dismissed. 1 *Ch. Rep.* 259.

(12.) It being alledged in the Bill, that the Defendant the surviving Partner, carrying on a distinct Trade for himself with the Persons that were Debtors to the joint Trade, to oblige them, forbore to call in their Debts; upon Motion, it was ordered, that an able Attorney should be appointed to sue for and recover those Debts; unless the Defendant should give Security to answer the Moiety of the Debts, that were standing out. *Vern.* 118.

Maxim IX.

Equity prevents Multiplicity of Suits.

(1.) **T**HE Bill was against an Executor to (a) discover Assets, and to have Satisfaction; it was insisted for the Defendant, that the Plaintiff ought not to have Relief here, having a proper Remedy at Law; but the Court being possessed of the Cause, and the same being as proper for this Court as at Common Law; decreed, to avoid Circuity of Action, that the Defendant should come to an Account, and pay the Plaintiff his Debt. 2 *Ch. Rep.* 37. and in a Bill for the same Purpose, the Defendant pressed for a (b) Dismissal, because the Plaintiff had the Effect of his Suit, *viz.* to have a Discovery; but *per Cur.* as to Dismissal to Law, because the Plaintiff hath Discovery here,

(a) A Bill was brought against an Executor at the Suit of a Creditor to discover Assets; it was demurred to, because it was brought before any Suit commenced at Law; by which Means the Defendant is doubly vex'd; for perhaps if he were sued at Law, he would confess the Debt, or pay it,

rather than stand out Suit. *Hard.* 115. (b) Even if there had been no Prayer for Relief, the Bill should not be dismissed, because the Plaintiff has the End of his Suit by the Discovery; as in a Bill to examine Witnesses *in perpetuam rei Memoriam*, the Bill cannot be dismissed, and yet the Defendant ought to have his Costs, for an Heir at Law ought not to pay for his own Disinheritance; and therefore the Defendant must move to have his Costs; which is never denied.

here, when this Court can determine the Matter, it shall not be an Handmaid to other Courts, nor beget a Suit to be ended elsewhere. 2 Ch. c. 200.

(2.) The Obligee in a Bond brought a Bill against the Heir of the Obligor, to be relieved touching an Error in the Bond, viz. *quadragint'* instead of *quadrigent' libr'*, though the Defendant offered to admit the Bond to be for 400 l. and so try it; yet the Court decreed an Account of the Profits of the Lands, and Satisfaction thereout. 2 Ch. c. 225.

(3.) The Plaintiff and Defendant being Partners in Trade, upon settling Accounts they dissolve the Partnership, and each had his Dividend. But the Defendant covenanted to save the Plaintiff harmless from all Losses and Damages due, or which might be due, or brought on, or which might or should happen to the Plaintiff in Relation to his Dividend; the Plaintiff being sued for some Customs unpaid for Goods which belonged to the joint Trade, was compelled to pay 60 l. and Costs; and having afterwards received some Monies due to the Defendant, but no Way relating to the Partnership; and being sued at Law by the Defendant for such Monies, brought his Bill to (a) retain sufficient to pay himself for the 60 l. and Costs: Which was decreed accordingly. 1 Ch. c. 311.

(a) It is the Custom of Companies, that if they owe a Man 100 l. they

will give him Credit for so much; and therefore in Respect of a Company, Stoppage is to be allowed as a good Payment. Vern. 122.

(4.) A. directed B. to pay to C. what Sums C. should want; C. accordingly received two Sums of Money (among others) of B. for which he gave Receipts as by the Order of A. A. and C. come to an Account, which being stated, they gave mutual Releases; but the two Sums not being entered in the Books of A. were not accounted for by C. B. not having received any Allowance from A. for the two Sums, prefers his Bill against C. to have the Money paid back; C. confessed the Receipts, but insisted he ought not to pay the Money back, for that they never had any Dealings together but upon the

Credit of *A.* and it was to be presumed the Plaintiff had an Allowance from *A.* he never paying the Defendant any Thing but upon the Credit of *A.* and the Receipts being in Writing and so worded. But the Court decreed the Defendant should return the Money, for the Plaintiff has a fair Claim against the Defendant to avoid Circuity of Suits, for otherwise it would only turn the Plaintiff on *A.* and *A.* on the Defendant again in Equity to set aside the Release, and to have an Allowance of those Sums; which Decree was affirmed upon an Appeal to the House of Peers. *Sh. P. C.* 17.

(5.) There having been two Issues directed; the one, whether the Lord of the Manor had a Grant of *Free Warren*; and the other, in Case he had a Grant of *Free Warren*, whether there were sufficient Common left for the Tenants: Upon Motion for a new Trial, the Lord Chancellor said, these Matters were properly triable at Common Law; and he did not see what Jurisdiction the Chancery had of this Cause: But it was urged, the Bill was brought to prevent Multiplicity of Suits, and was in its Nature a Bill of Peace; and a new Trial was granted. *Vern.* 22.

(6.) A Bill shewing, that one Commoner had recovered one Shilling or other small Damages against the Plaintiff for oppressing the Common, or for using the Common where he ought not, and therefore that the Defendant another Commoner may accept of like Damages for what is past, to prevent Charges at Law, is in the Nature of a Bill of Peace, and proper in this Court. *Vern.* 308.

(7.) A Fair having been held Time out of Mind, within a Manor; but the Pickage and Stallage and other Profits, belonging to several Tenants of the Manor, who claimed several Acres of the Land, whereon the Fair was held; the Lords of the Manor, being a Corporation, surrendered their old Charter, and got a new one, empowering them to hold the Fair any where; and for their own Profit, would remove it to another

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Place, the Soil whereof belonged to them ; hereupon several Actions being brought on both Sides ; a Bill was brought by the Tenants to (a) quiet them in the Possession, and to have a perpetual Injunction ; which *per Lord Keeper*, is very proper in this Court, being a Bill of Peace, and in such Case, this Court ought to interpose and prevent Multiplicity of Suits. *Vern.* 266.

(a) *Vide Max.*
S. c. 2.

Maxim X.

Equity regards Length of Time.

(1.) **T**HE Defendant would avoid an Estate for want of Livery and Seisin, but because the Plaintiff enjoy'd 25 Years, it was decreed he should enjoy it quietly. *Toth.* 54. S.C. cited, *Vern.* 196. where said after such a Length of Time, this Court will presume Livery.

(2.) The Plaintiff had 40 Years Possession of a Pifcary ; the Court decreed the Defendants to surrender and release their Title to the same, though the Surrender made by the Defendants Ancestors was defective, *Pencose* and *Trelawny* cited, *Vern.* 196. and after 40 Years Possession of a Copyhold under a Will, there appearing no Surrender to the Use of such Will, the Court decreed the Want of a Surrender should be supplied. *Vern.* 195. S.C. 2 *Ch. c.* 150.

(3.) The Plaintiff sought to have a Conveyance of his Father's Estate set aside, which was made 20 Years since, when the Father was 80 Years old, and *non compos Mentis* ; the Court declared, that after 20 Years, and two Purchases, it was not proper for this Court,

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to examine a *non compos Mentis*, and dismissed the Bill. 1 *Ch. Rep.* 40.

(4.) The Defendant set up an old Mortgage made 60 Years ago; and no Interest appearing to have been paid for 40 Years, or any Demand made upon Account of the Mortgage; the Court decreed a *Vacat* to be entered on the Inrollment of it. 1 *Ch. Rep.* 105.

(5.) A Bond of 22 Years old came to the Hands of an Executor, and forasmuch as the Obligee, the Testator, lived till about 7 or 8 Years past, and never demanded any Interest; the Court conceived the Bond hath been satisfied, and decreed the same to be cancelled, and if Judgment entered thereon, the same to be vacated. 1 *Ch. Rep.* 78. So a Bond entered into by the Plaintiff to save the Defendant harmless, being 23 Years old, was decreed to be delivered up to be cancelled. 1 *Ch. Rep.* 88. So of an antient Statute. 1 *Ch. Rep.* 106.

(6.) The Bill was against the Executors of the Purchaser of Lands, to have 500 *l.* Part of the Purchase-Money paid, which was decreed 33 Years ago to be paid for the Use of the Plaintiff; the Defendants pleaded, that their Testator lived in *London* 'till about 10 Years past, and the Plaintiff might have had Remedy against him; and no Suit having been commenced against him in his Life-time, nor any till now; and the Defendants the Executors having nothing to shew for the Payment; and all Parties concerned therein being dead; therefore after all this Time, the Defendants ought not to be charged therewith; the Court held the Plea good. 2 *Ch. Rep.* 44.

(7.) Bill of Review to reverse a Decree made 16 Years ago; the Court in Regard the Decree was made so long since, and nothing done against the same in all this Time, would not reverse it. 1 *Ch. Rep.* 139. *S. P.* 2 *Ch. Rep.* 48.

(8.) A Common that has been inclosed for 30 Years, shall not afterwards be thrown open. *Vern.* 32.

(9.) A

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(9.) A Bill was exhibited, setting forth, that the Defendant, in a Replevin had avowed for a Rent-charge, and Issue was taken thereupon, upon the Seisin of the Grantor; and it was found for the Defendant; which Verdict the Plaintiff complained of, alleging that the Rent pretended to be granted, had not been paid in 50 Years, and other Circumstances to render the Grant suspicious, &c. it was decreed that there should be a new (a) Trial. 2 *Ventr.* 351.

(a) *Note*; This could not have been

tried again at Law, because the Verdict in Replevin is conclusive. 2 *Ventr.* 352.

(10.) The Testator devised his Lands to his Executors, upon Condition that if any of his Name would purchase them for his own Use, then his Will was, that his Executors should sell the same to him for 200 *l.* less, than the reasonable Value thereof; the Executors enjoyed the Lands for 10 Years, and one dying, the Survivor levied a Fine of the whole, and 5 Years passed; the Plaintiff 25 Years after the Testator's Death, brought his Bill to have a Conveyance of the Lands, for 200 *l.* less than they were worth to be sold. But the Court conceived, that the Plaintiff's Bill being brought so long after the Testator's Death, what was pray'd thereby, was unreasonable, and therefore dismissed the Bill. *Vern.* 362.

Maxim XI.

Equity will not suffer a double Satisfaction to be taken.

(1.) **T**HE Grandfather devised Lands to his Son, to pay ten Pounds *per Ann.* to the Son's three Daughters; the Father gives 200 *l.* in (a) Marriage with one; decreed the ten Pounds *per Ann.* should be included in the 200 *l.* *Toth.* 78.

(a) But if a Father bound to pay a Legacy to his Son and Heir, disin-

herits him, but makes another Provision for him, the Legacy shall not be included in that Provision: As Legacies of 50 *l.* and 100 *l.* being devised to the Son and Heir, the Father received them; and after the Father entered into a Bond to leave the Son 6000 *l.* at his Death, but by his Will disinherited him; although it was insisted, that all the Son's Demands must naturally be intended to be included in this Bond; yet *per Cur'*, I will do all I can to help an Heir that is disinherited; and the Executor shall be allowed no more than what he can prove to have been actually paid towards Satisfaction of these Legacies, and *eo nomine* as in Part of the Legacies. *Vern.* 480.

(2.) The Husband before Marriage became bound to a Trustee, in a Bond of 3000 *l.* to acknowledge a Statute within six Months after his Marriage, defeazanced, that if he did not within a convenient Time after his Marriage, convey Lands of 500 *l.* *per Ann.* for the Wife's Jointure, then he should leave her 1000 *l.* at his Death: He by Will devised to her Lands in Fee, worth 52 *l.* *per Ann.* The Court decreed this to be in (b) Lieu of her Jointure, and that the Bond should be delivered up and cancelled. 1 *Ch. Rep.* 45. So the Husband articted before Marriage to settle 1000 *per Ann.* on his intended Wife for her Jointure. He makes a Settlement in Pursuance of the Articles; but the Conveyance being ill penned, Part of the Lands thereby intended to pass, did not pass. He afterwards made a voluntary Settlement

(b) There were some Proofs offered, that it was a voluntary Gift, and not in Respect of the Bond or the Jointure; but the Court being of Opinion that they were but Conjectures, de-

creed it to be a Satisfaction; which implies, that if the Proofs had been sufficient, they would have decreed otherwise. 1 *Ch. Rep.* 45.

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ment upon her for her Life, of Lands of 500 *l.* *per Ann.* if she brings a Bill to have the Defect of her Jointure supplied, the subsequent Settlement shall be taken as a (a) Satisfaction. 2 *Ch. c.* 68.

(a) But where the

Husband on the Marriage charged the Lands with a Rent-charge for the Jointure of the Wife, and devised Part of those Lands to the Wife; the Heir pray'd that the Lands devised to the Wife, might bear their Proportion of the Rent-charge. But *per Cur'*, the Grantee of the Rent-charge, may distrain in all or any Part of those Lands for her Rent, and there is no Reason to abridge her Remedy in Equity; and the Husband certainly intended her some Benefit by this Devise, and he has not declared it should be accepted in Part of the Rent-charge; and so dismissed the Bill. *Vern.* 347.

(3.) Sir *W. B.* having a Son and two Daughters by a first Venter, upon his second Marriage settled the Land in Jointure upon his Wife, and after in Case of their having Issue Female, to raise 3000 *l.* for such Issue. And having one Daughter by such second Marriage, he devises the Reversion of the settled Lands, and all his other Lands to Trustees, and says, that after the Son by a convenient Match shall have raised 9000 *l.* for his three Daughters, that then the Trustee should let the Son have the Estate. It was decreed, that if the Heir paid the 9000 *l.* the Security by the Settlement should be discharged; the Will being but cumulative Security, and so the Daughter by such second Marriage was to have but (b) one 3000 *l.* and the Court cited a Case, where a Man had secured Portions for his Children, and afterwards by his Will devised to each of them a like Sum; it was held that this would not double their Portions, unless plainly proved, that he (c) intended it so. 2 *Ventr.* 347, *S. C.* 2 *Ch. Rep.* 162.

(b) Note; By the Settlement the 3000 *l.* was to be paid to the Daughter at her Day of Marriage, so that she married after 16; or otherwise at the Age of

18; and if she died before either, then his Heir to have the Benefit; it was decreed, that this one 3000 *l.* which she was to have only, should be liable to the same Contingencies, 2 *Ventr.* 347. but that it ought to be paid in the first Place, whether the Lands in present Possession devised, and the said Reversion, which are liable to the said Will, be sufficient or not, to raise the whole 9000 *l.* 2 *Ch. Rep.* 165. and in the mean Time 'till Payment, she was to have a third Part of the Profits of the Lands devised. 2 *Ventr.* 347. (c) The Court declared, there was no Intention of the Father to make a double Portion for the Daughter; and therefore she ought to have but one 3000 *l.* 2 *Ch. Rep.* 165. and in all these Cases of Devises, the Intention ought to be the Rule; as where an Uncle owed his Niece 300 *l.* by Bond, and by his Will gave her 300 *l.* and after making his Will, borrowed 100 *l.* more of her; though it was insisted that it was the Rule in Equity, that where the Debtor gives his Debtor a Legacy greater than the Debt, it shall go in Satisfaction; for a Man shall be intended to be

just before he is kind; otherwise where the Legacy is less, for that is neither to be just nor kind; yet *per Lord Chancellor*, it may be as good Equity to construe him to be both just and kind, if he *intended* to be both; if any Part of this 300 *l.* be applied to the Payment of the Debt, as for so much it is not a Gift; whereas a Legacy must be taken to be a Gift or Gratuity; and there being Assets, and some Proofs of the Testator's greater Kindness to that Niece, than his other two Nieces, to whom he had given Legacies of 200 *l.* a piece by his Will, the whole 300 *l.* over and above the Debt was decreed her, 1 *Salk.* 155. *S. P.* 2 *Salk.* 508. that a Legacy shall not be taken as a Satisfaction of a Debt; for a Court of Equity ought not to hinder a Man from disposing of his own as he pleases; and when he says he gives a Legacy, we cannot contradict him and say that he pays a Debt; and as to a Debt contracted after the making of the Will, there is no Pretence to make a Legacy to be a Payment of that. So if a Legacy be less than a Debt, it was never held to go in Satisfaction. So if the Thing given was of a different Nature, as Land, it should not go in Satisfaction of the Money. So if a Legacy be upon Condition, for by the Breach he may be a Loser, whereas the Will intended it for his Benefit. And in a late Case of Sir *J. Scudamore*, decreed *Trin.* 1726. The *Residuum* of a personal Estate, being 8500 *l.* was devised to an Executrix, in Trust to purchase Lands to the Use of her self for Life, Remainder to Sir *J. Scudamore* in Fee. She purchased Lands to the Value of 3500 *l.* but it did not appear, that she bought them with the Trust-Money: The only Proof that was made, was by a Book, where she kept a regular Account of the Trust-Money, and it did not appear there, that this Purchase was made with Part of the Trust-Money. She devised these Lands to Sir *J. Scudamore* in Fee, and by her Will gave several Legacies to the Plaintiffs, for which there would not be sufficient Assets, if the Devise of the Lands, should not be construed a Satisfaction *pro tanto*; *per Lord Chancellor*. It does not appear, that the Money laid out in the Purchase of these Lands, was Part of the Trust-Money. So that the sole Question is, whether, when a Trustee, being obliged to lay out the Trust-Money in the Purchase of Lands, purchases Lands, but does not declare it to be in Pursuance of the Trust, and devises those Lands to the *Cestuy que Trust*, and by the Will gives also many Legacies, which, if this be not construed a Satisfaction, can never be paid; whether in Conscience, to make the Will consistent, and every Part of it satisfied, this ought not to be construed to be a Satisfaction; and since it cannot be imagined, that she at the Time of her Death, intended to amuse the Legatees with vain Hopes of their Legacies, which she knew could never be paid, except this Devise is to be taken as a Satisfaction; therefore decreed it to be a Satisfaction *pro tanto*.

(4.) By Articles made on the Marriage of the Plaintiff, her Father was to pay 50 *l.* as her Portion, and the intended Husband was to have made a Settlement; the Husband died Intestate, before the Portion paid, or the Settlement made: She takes out Administration to her Husband, and thereby becomes entitled to the 50 *l.* and now brings her Bill against the Heir of her Husband, to have her Jointure according to the Marriage-Articles; *per Cur.* the Plaintiff shall not have the Money as Administratrix, and also the Jointure too, which was to be made in Consideration of the Money, and in Expectation that the Husband should have received it; and therefore (a) dismissed the Bill with Costs. *Vern.* 463.

(a) But a
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titled to these two Demands in distinct Capacities; and *Vide* the Case of *Jason* and *Farvis*; the Husband of the Defendant being seized of the Land, sold it to the Plaintiff; the Plaintiff contracted with *J. S.* to sell him the Land for 1200 *l.* and entered into a Statute, to convey the Land free from Incumbrances, and to deliver Possession; or in Default thereof, to repay the 1200 *l.* the Husband dies, and the Defendant set up a Settlement, whereby her Husband was but Tenant in Tail, and she was to have the Land as her Jointure, and so evicted the

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18; and if she died before either, then his Heir to have the Benefit; it was decreed, that this one 3000 *l.* which she was to have only, should be liable to the same Contingencies, 2 *Ventr.* 347. but that it ought to be paid in the first Place, whether the Lands in present Possession devised, and the said Reversion, which are liable to the said Will, be sufficient or not, to raise the whole 9000 *l.* 2 *Ch. Rep.* 165. and in the mean Time 'till Payment, she was to have a third Part of the Profits of the Lands devised. 2 *Ventr.* 347. (c) The Court declared, there was no Intention of the Father to make a double Portion for the Daughter; and therefore she ought to have but one 3000 *l.* 2 *Ch. Rep.* 165. and in all these Cases of Devises, the Intention ought to be the Rule; as where an Uncle owed his Niece 300 *l.* by Bond, and by his Will gave her 300 *l.* and after making his Will, borrowed 100 *l.* more of her; though it was insisted that it was the Rule in Equity, that where the Debtor gives his Debtor a Legacy greater than the Debt, it shall go in Satisfaction; for a Man shall be intended to be

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just before he is kind; otherwise where the Legacy is less, for that is neither to be just nor kind; yet *per Lord Chancellor*, it may be as good Equity to construe him to be both just and kind, if he *intended* to be both; if any Part of this 300 *l.* be applied to the Payment of the Debt, as for so much it is not a Gift; whereas a Legacy must be taken to be a Gift or Gratuity; and there being Assets, and some Proofs of the Testator's greater Kindness to that Niece, than his other two Nieces, to whom he had given Legacies of 200 *l.* a piece by his Will, the whole 300 *l.* over and above the Debt was decreed her, 1 *Salk.* 155. *S. P.* 2 *Salk.* 508. that a Legacy shall not be taken as a Satisfaction of a Debt; for a Court of Equity ought not to hinder a Man from disposing of his own as he pleases; and when he says he gives a Legacy, we cannot contradict him and say that he pays a Debt; and as to a Debt contracted after the making of the Will, there is no Pretence to make a Legacy to be a Payment of that. So if a Legacy be less than a Debt, it was never held to go in Satisfaction. So if the Thing given was of a different Nature, as Land, it should not go in Satisfaction of the Money. So if a Legacy be upon Condition, for by the Breach he may be a Loser, whereas the Will intended it for his Benefit. And in a late Case of Sir *J. Scudamore*, decreed *Trin.* 1726. The *Residuum* of a personal Estate, being 8500 *l.* was devised to an Executrix, in Trust to purchase Lands to the Use of her self for Life, Remainder to Sir *J. Scudamore* in Fee. She purchased Lands to the Value of 3500 *l.* but it did not appear, that she bought them with the Trust-Money: The only Proof that was made, was by a Book, where she kept a regular Account of the Trust-Money, and it did not appear there, that this Purchase was made with Part of the Trust-Money. She devised these Lands to Sir *J. Scudamore* in Fee, and by her Will gave several Legacies to the Plaintiffs, for which there would not be sufficient Assets, if the Devise of the Lands, should not be construed a Satisfaction *pro tanto*; *per Lord Chancellor*. It does not appear, that the Money laid out in the Purchase of these Lands, was Part of the Trust-Money. So that the sole Question is, whether, when a Trustee, being obliged to lay out the Trust-Money in the Purchase of Lands, purchases Lands, but does not declare it to be in Pursuance of the Trust, and devises those Lands to the *Cestuy que Trust*, and by the Will gives also many Legacies, which, if this be not construed a Satisfaction, can never be paid; whether in Conscience, to make the Will consistent, and every Part of it satisfied, this ought not to be construed to be a Satisfaction; and since it cannot be imagined, that she at the Time of her Death, intended to amuse the Legatees with vain Hopes of their Legacies, which she knew could never be paid, except this Devise is to be taken as a Satisfaction; therefore decreed it to be a Satisfaction *pro tanto*.

(4.) By Articles made on the Marriage of the Plaintiff, her Father was to pay 50 *l.* as her Portion, and the intended Husband was to have made a Settlement; the Husband died Intestate, before the Portion paid, or the Settlement made: She takes out Administration to her Husband, and thereby becomes entitled to the 50 *l.* and now brings her Bill against the Heir of her Husband, to have her Jointure according to the Marriage-Articles; *per Cur.* the Plaintiff shall not have the Money as Administratrix, and also the Jointure too, which was to be made in Consideration of the Money, and in Expectation that the Husband should have received it; and therefore (a) dismissed the Bill with Costs. *Vern.* 463.

(a) But a
Quere is
made by the
Reporter;
for she is en-

titled to these two Demands in distinct Capacities; and *Vide* the Case of *Jafin* and *Javis*; the Husband of the Defendant being seized of the Land, sold it to the Plaintiff; the Plaintiff contracted with *J. S.* to sell him the Land for 1200 *l.* and entered into a Statute, to convey the Land free from Incumbrances, and to deliver Possession; or in Default thereof, to repay the 1200 *l.* the Husband dies, and the Defendant set up a Settlement, whereby her Husband was but Tenant in Tail, and she was to have the Land as her Jointure, and so evicted the

Estate

Estate from J. S. who afterwards died, and made the Defendant his Executrix, whereby she became intitled to the 1200*l.* the Plaintiff insisted, that it was a Case of great Extremity, that the Defendant should have the Land, and the 1200*l.* too; but *per Cur.* there is no Weight in that Objection, for she has an Estate for Life in the Land by the Settlement, and she has the Money as Executrix to J. S. & *quando duo Jura in uno conveniunt, æquum est, ac si essent in diversis.* Vern. 284.

Maxim XII.

Equity suffers not Advantage to be taken of a Penalty or Forfeiture, Where Compensation can be made.

(1.) **A** Copyholder for Life by cutting Timber forfeited his Estate; the Lord entred, and admitted the Defendant who had a Verdict at Law; the Copyholder exhibited his Bill to be relieved against the Forfeiture, offering, if it should appear to be Waste, to make Satisfaction: Upon an Issue directed to try, *whether it was the primary (a) Intention in cutting the Timber to do Waste*; it being found for the Plaintiff, it was decreed, he should be (b) relieved, and the Defendant to deliver Possession, and account for the *mesne* Profits.

(a) For in Case of a wilful Forfeiture, the Court declared, they would not relieve. *Vide* 1 *Ch. c.* 95.
ant. Max. 2.

c. 3. (b) *Vide* *Toth. 3.* Where the Court compelled the Lord to admit a Tenant Copyholder to sue at Law, without any Forfeiture of his Copyhold.

(2.) If A. conveys Lands to B. &c. and their Heirs, upon Trust that if C. the Son of A. within six Months after the Death of A. should secure to Trustees 500*l.* for the younger Children of C. then after such Security given, to convey to C. and his Heirs; and until the Time for giving such Security, in Trust for the eldest Son of C. and in Default of such Security, to convey

to such eldest Son and his Heirs; If C. dies before any such Security given, yet this Condition (a) *precedent* being only in Nature of a Penalty, the Intent of the Trust shall be regarded, which was to secure 500 l. to the younger Children. 1 Ch. c. 89.

(a) Note; This was a Condition *precedent*, and yet the Court relieved against it, although it was said

by Lord Chancellor, Vern. 93. that Conditions *precedent* must be literally performed, and that the Court will never vest an Estate, where by reason of a Condition *precedent*, it will not vest at Law; yet it appears by this and the following Cases, that Relief is given against Conditions *precedent*, where Compensation can be made.

(3.) The Father seised in Fee, devised the Lands to his Daughter and her Heirs; and his Mind is, that (b) if his Son pay to her 50 l. then his Son (c) shall have the Land; the Money was not paid at the Day; the Daughter sold the Lands; it was decreed against the Vendee; the Son paying the Money; for the Court took it but as in Nature of a Security. 2 Ch. c. 1.

(b) Note; The Payment of the 50 l. was *precedent* to Vesting the Estate in the Son; and yet the Court relieved.

(c) The Fee-simple was

decreed to him; but a *Quære* is made by the Reporter; for if he had performed the Condition, he could have had but an Estate for Life; and there is no Reason, that his Failure should give him a greater Estate in Equity, than the Will in Writing gives him on Performance of the Condition, by the express Words of the Will.

(4.) It was provided by the Marriage-Articles that in Case, the Husband did not, within two Years after the Marriage, settle such a Jointure on the Wife, as by the Articles was agreed to be settled; that then the Husband should only have Interest paid him during his Life for the Wife's Portion; the Wife died within the two Years, he not having settled such Jointure, as by the Articles he was obliged to settle. He brought his Bill to be relieved against the Articles, insisting that if he had at any Time settled such Jointure upon his Wife, though not within the Time prescribed by the Articles, he should have been relieved against the Articles, and have had the Portion decreed him; but the Bill was (d) dismissed; and Colonel Cheek's Case was

(d) Note; No Reason is given in the Book, why

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cited;

the Bill was dismissed; but a *Quære* is made in the Margin, whether the Husband's making a Settlement be not a Condition *precedent* to the Payment of the Portion? But the Reason seems to be, because no Compensation could be made after the Wife's Death, since no Jointure could be then settled on her; and this is more apparent, from the Reasoning of the Counsel for the Husband, viz. that if she had lived, he might have settled a Jointure, even after the two Years, and been decreed to the Portion; which if so, then it is the Settling the Jointure, (that is) the making Compensation, (which might be done at any Time before her Death, but not after) that makes the Difference.

cited; who by Articles made on his Marriage was to have 4000 *l.* Portion with his Wife; 1500 *l.* down in Hand, and 2500 *l.* more, if he made a Settlement within the Space of three Years; it happened that his Lady died within two Months after the Marriage, he not having in that Time made such Settlement, as by the Marriage-Articles he was obliged to have made; and he in that Case exhibited a Bill to be relieved, and was dismissed. *Vern.* 68, 69.

(5.) The Father by Will gave 2000 *l.* apiece to his Daughters in Case they should release to his Heir their Right to certain Lands; one of the Daughters died before she gave such Release, and therefore the Heir refused to pay the Portions; the Daughters exhibited their Bill to be relieved, and were dismissed by Lord Chancellor Nottingham; but upon a Bill of Review, tho' it was argued that this being a Condition *precedent*, and being not performed, there could be no Relief; yet Lord Keeper North inclined to over-rule the Demurrer; and said that in all Cases, where the Matter lies in Compensation, be the Condition *precedent* or *subsequent*, he thought there ought to be Relief. *Vern.* 222.

(6.) A Man devised Lands to J. S. upon Condition to pay 20000 *l.* to his Heir at Law, *viz.* 1000 *l.* *per Ann.* for the first sixteen Years, and 2000 *l.* *per Ann.* after 'till the whole should be paid. The Heir entred for Non-payment of one of the 1000 *l.* *per Ann.* J. S. brought his Bill and was relieved; the Court declaring, *that wherever they can give (a) Satisfaction, or Compensation for the Breach of a Condition, they can relieve.* 1 Salk.

(a) And accordingly, the Court gave the Heir Interest 156.

for every 1000 *l.* from the Time it became payable, because both the Sum and Time of Payment were certain.

(7.) If there be a Portion of 8000 *l.* given to a Woman, provided she marries not without the Consent of A. and that if she marries without his Consent, that she shall have but 100 *l.* *per Ann.* yet if she mar-

ries

ries without his Consent, she shall be relieved ; for the Proviso is *in terrorem* only. 1 Ch. c. 22 S. P. Vern. 20. 2 Ch. Rep. 23. But if the Portion had been (a) limited over, she shall not be relieved. 2 Ch. Rep. 95. So if A. (b) devises a Messuage, &c. to B. his Wife, Remainder to C. his Grand-daughter in Tail, upon Condition that C. marries with the (c) Consent of his Wife, or the major Part of them ; and if she marries without their Consent, then he devises the same to F. and his Heirs ; and after C. steals away and is married without the Consent of any of them ; she shall not be relieved in Equity ; the great Case of *Fry and Porter*. 1 Ch. c. 138. S. C. 2 Ch. Rep. 26. 1 Mod. 300. So where the Uncle by Lease and Release settled the Lands to the Use of himself for Life, Remainder to the Plaintiff for Life, Remainder to his first and other Sons in Tail, Remainder to the Defendant, with a Power of Revocation to the Uncle ; *provided*, that if the Plaintiff married without Consent of the Uncle during his Life, and after his Death, of A. B. &c. then the Uses limited to the Plaintiff and his Sons to cease, and then to the Use of the Defendant. He married without Consent having no Notice of the Conveyance or Proviso ; But his Uncle (who knew not of the Marriage) entertained him kindly, and gave Legacies to him by his Will, and died ; the Defendant disturbed the Plaintiff because of the Forfeiture, who brought his Bill to be relieved ; but he was dismissed to Law. 2 Ch. c. 109. So C. devised his Lands to Trustees for three Years ; and

(a) Though the Limitation over is here given as the Reason, why there should be no Relief; yet per Hale C. B. (in his Argument in the Case of *Fry and Porter*) this is not like the Case of a Mortgage, where the Condition is for Payment of Money, because if the Money be not paid at the Day, there may be a Compensation made by Payment at another Day with Damages. 1 Ch. c. 142. and per Lord Chancellor the Reason why there was a Forfeiture in that Case, was because Marriage without Consent, was a Thing of that Nature, that no after Satisfaction could be made for it.

2 Vent. 352. and per Lord Chancellor, the Reason of the Forfeiture was, because the Non-performance of that Condition, viz. (marrying with Consent) could not be compensated with Damages, Vern. 83. and though it may be as well said, that no Compensation for such Marriage without Consent, can be made, where there is no Limitation over, any more than where there is ; yet Note, where there is no Limitation over, there is no Person to whom the Compensation is to be made ; which makes the Difference. (b) It was argued, that as in Case of a personal Legacy, such a Proviso would be void by the Civil Law, because it is a Maxim with them, *Matrimonium esse liberum* : So it ought to be in Case of a Devise at Law of Lands, 1 Mod. 306. and tho' it was said by Hale C. B. that if the Question were of a Legacy, there might be a great deal of Reason to question the Validity of it, because in those Courts where Legacies are handled, it would have been void. But this is a Case of Lands, (*Devise*) 1 Mod. 308. yet it appears, that such a Proviso annexed to a Legacy, shall not be deemed void in a Court of Equity. Vern. 20. (c) What is a sufficient Assent, vide Max. 13. c. 4.

if within the three Years there happened a Marriage between the Lord G. and Mrs. W. who was his Heir at Law; then to Mrs. W. for Life, Remainder to her first Son, &c. but if the Marriage did not happen, then to the Lord F. in Tail; Lord G. would not marry the Lady, but married another Person, and after the Lady married the Plaintiff, who was urged to be a Person equal in all Circumstances to the Lord G. and they exhibited their Bill to have the Lands, for that it ought not to be in the Power of the Lord G. to deprive the Lady of the Lands, by his not marrying her; and the rather because there was no (a) Default in her; But the Court of Chancery would not grant Relief in this Case; though the Condition was answered to what the Lady was capable of doing; for that the Condition was *precedent*, and though Chancery relieves Non-performance, it is only upon a Forfeiture for which Equity can have a Valuation made, and give a Compensation. 1 *Salk.* 231.

(a) This Decree was reversed in the House of Peers; but no Reason is given in the Book. But there seems no Difference between this Case, and that of *Fry*

and *Porter*, except as to the Point of Disobedience; for in this Case, there was no Act of Disobedience in the Lady, nor any Manner of Default in her; but in the other Case there was; and as this was a very great Consideration in the Court of Chancery not to relieve in that Case, so it might be the same Consideration in the House of Peers to relieve in this; and *Vide 2 Ch. Rep.* 391. where the Son being Devisee of Lands upon good Behaviour, for his Misbehaviour it was decreed against him.

(8.) A Man devised to each of his Daughters 20000 *l.* provided, that if they or either of them married before the Age of 16. or that if the Marriage were without the Consent of such Persons, then they should lose 10000 *l.* of the Portion, and that 10000 *l.* should go to his other Children; one of the Daughters married under the Age of 16. but with the Consent of all the Parties, it was urged, that it being with Consent, it might be at any Age; but my Lord *Keeper* was of Opinion, that both Parts must be observed. 2 *Vent.* 356.

(9.) The Testator devised his Estate to the Defendants in Trust for the Use and Benefit of the Plaintiff, but declared his Will to be, that the Plaintiff should have no Benefit of the Devise, unless the Plaintiff's

Father should settle on the Plaintiff two full Thirds of the Estate settled on the Father on his Marriage; and in Default thereof the Estate to the (a) Defendants; the Father made no Settlement on the Plaintiff, but devised all his Estate to him (b) for Life, but subject to the Payment of Debts; it was admitted and so adjudged by the Court, that this Estate was executed in the Plaintiff by the Statute of *Uses*, and consequently that this is a Condition *subsequent*; yet the Court declared, that tho' Conditions (c) *subsequent*, which are to devest an Estate, need not be literally performed, yet even in such Case, if the Party cannot be *compensated* in Damages, it would be against Conscience to relieve; and therefore ordered the *Master* to examine the Value of the Estate devised, and the Amount of the Debts, which that Estate was charged with, and to report to the Court, whether after Debts paid, there would be two full Thirds of the Father's Estate, which was settled upon him in Marriage, left to the Plaintiff, *Vern.* 79. and upon a Rehearing, would not vary the former Decree, declaring, that the Difference was whether this Case lay in *Compensation*, or not; and if a *Compensation* was made, he would relieve against the Breach of the Condition: But in Case a sufficient *Compensation* was not made, he would then consider farther of it. *Vern.* 167.

(a) Here Note, the Limitation over, is to the Executors, and *vide* 1 Ch. c. 58. where 900*l.* was secured by Lease to a Feme Sole, in case she married not contrary to the Liking of A. and if she doth, then for such Person as A. shall nominate, and for Want of such Nomination, for A. and she marries without the Consent of A. yet he cannot dispose of the Lease otherwise than for her Benefit. So where a Feme Covert, having Power by Will to devise Lands, devised them to her Executors, to

pay 500*l.* out of them to her Son, provided that if the Father gave not a sufficient Release of certain Goods to her Executors, that then the Devise of the 500*l.* should be void and go to the Executors; and after her Death a Release is tendered to the Father, and he refuses; yet upon making the Release after, the Money shall be paid to the Son; for though a Condition is generally binding, where there is a Devise over, yet here being to go to the Executors, 'tis no more than what the Law implies, 2 *Ventr.* 352. though *Vide* 2 Ch. Rep. 95. Where a Portion was given to a Daughter, but if she should marry without the Consent of her Father and Mother, or one of them, then to be paid to such Person, as the Mother by Writing under her Hand should appoint; the Wife by Deed directed, that if the Daughter should marry without the Consent of her or her Husband, then the Money to be paid to her and her Husband, or to the Survivor of them; the Wife died, and the Daughter married without the Consent or Privity of her Father, and after he had forbidden her to marry on Forfeiture of his Blessing; the Court decreed the Money to the Father. (b) Tho' by the Will he was Tenant for Life, but by the Condition he was to have a greater Estate; yet the Court conceived that was well enough. *Vern.* 83. *Vide* Max. 13. c. 4. (c) As by the former Cases it appears, that Relief can be given against Conditions *precedent*, if Compensation can be made; So by this it appears, that Relief cannot be given even against Conditions *subsequent*, if *Compensation* cannot be made. So that the Distinctions taken between Conditions *precedent* and *subsequent*, as to Relief, seem to be trifling; and the Distinction is only, where *Compensation* can or cannot be made.

(10.) A Man devised his Lands called S. to his younger Son, and declared, that if he should be any way hindered of enjoying them, then in Lieu thereof he should have *all* the Lands at B. A Moiety of the Lands called S. were evicted from the Devisee, who thereupon insisted to have the whole Lands at B. But the Court decreed, that he should have as much of the Lands at B. as were equal in Value to those evicted; for it was a Condition that lay in *Compensation*. *Vern.* 270.

(11.) The Mother limited the Lands to *John* her younger Son, he paying unto *Katharine* her Daughter 1200 *l.* within six Months after the Estate should fall into Possession; *provided*, that if *Thomas* the elder Son died without Issue, so as his Estate should come to *John*, then if *John* did not pay *Katharine* 1500 *l.* within six Months, the Lands should go to *Katharine* and her Heirs; *Thomas* died without Issue, whereby his Estate descended to *John*: *John* would not pay the 1500 *l.* for the Lands were not worth the Money; *Katharine* dying, the Question was between her Heir and Administrator, who should have the Lands; it was insisted for the Administrator, that this was only in Nature of a Security for Money, and that consequently he became entitled to the Money: But it was decreed for the Heir; the Court declaring, that to make this a redeemable Estate, would be to destroy the known Difference in the Law, between a Condition (a) and a Limitation over. *Vern.* 402, 430.

(a) Though this is the Reason given in the

Book; yet it may be observed; that no *Compensation* was made for the Non-performance of the Condition; for the Party who was to perform it, pray'd not to be relieved, but submitted to the Forfeiture; therefore *Quer.* if *John* was willing to pay the Money, whether the Administrator would not be decreed to the Money? And if so, then it is the making or not making *Compensation*, that makes the Difference between the Heir and Administrator, and not the Limitation over.

(12.) A Creditor having agreed with his Debtor, to take a Sum of Money less than his Debt, so as it was paid precisely by such a Day; he fails of Payment, and now brings his Bill, suggesting some equitable Excuses why he did not pay precisely at the Day; and that

that he tendred the Money within a Day or two afterwards; the Court dismissed the Bill, as containing no Equity; for *Cujus est dare, ejus est disponere*. Vern. 210. (a) It would be impossible to make Compensation, for the Damage which the

Creditor sustained by the Non-payment, is not to be known. (b) And so in all Cases where the Agreement is voluntary, the Condition shall be binding, if not strictly performed: As where the Mortgagee by Will remitted Part of the Mortgage-Money, provided the Rest be paid within three Years; the Mortgagor failing to pay, lost the Benefit of the Bequest. 1 Ch. c. 52. So the Father made a voluntary Settlement on the eldest Son, with a Proviso, that if he did not pay to his younger Brother 600 l. at his Age of 21, then the Estate of the eldest Son, both in Law and Equity, should cease; the Money not being paid; the Father granted away the Estate; the eldest Son was not relieved, in Regard the Conveyance was purely voluntary, and the Father might have put what Conditions and Restrictions upon his Son, he thought fit. Vern. 456. But where the Agreement is not meerly voluntary, it is doubtful, whether Equity will not relieve; as an Agreement to take a lesser Sum from a Debtor, provided he paid it at such a Day; but another became bound with him; here was a Bettering the Security, which was Part of the Consideration of the Agreement. 1 Ch. c. 110.

(13.) If A. gives a Bond of 20 l. to B. a Fishmonger, to behave himself civilly and not disparage the Trade of B. and after A. asks a Customer of B. whilst cheapning a Parcel of Flounders, why he would buy of B. and told him those Fish stunk; so that B. lost his Customer; and thereupon B. sues his Bond and gets a Verdict at Law, A. shall not be relieved in Equity, (c) for there is no Way to ascertain the Damages. 1 Ch. c. 184. (c) There is another Reason given; for that the

Penalty of the Bond was so small, that the Costs here and at Law would exceed the Penalty. Which seems the better Reason; for the Court declared, that this was not to be a Precedent in Case of a Bond of 100 l. or the like; and it is a common Case, to give Relief against the Penalty of such Bonds to perform Covenants, &c. and to send it to a Trial at Law to ascertain the Damages in a *Quantum damnificat*. Vide 1 Sid. 442.

(14.) The Plaintiff being employed by the East-India Company, as their chief Agent in India, covenanted that he would not trade for himself or any other in several Commodities; or in such Case to pay a Penalty of so much per Pound, which Sums were some four, some five, some seven Times the Value of the Commodities. But having bought such Commodities for himself in India to his own Use, the Company brought Debt for 26000 l. to which Sum the Penalties amounted; and the Plaintiff brought his Bill to be relieved, and though he proved that it was for the Benefit of the Company, that he so traded, for he bought none,

Maxims of Equity.

none, but what he sold to them at a just and Market-Price, and that if he had not provided such Goods, the Company could not have been supplied; and altho' he had given Notice to the Company of the Want, and he dealt with poor Artificers, who could not stay, but must have Advance before-hand, or else they would not work at all, but most probably would have been dealt with by the *Dutch* to the Loss of the Company; and though it was proved, that such Dealings was necessary for the Supply and Benefit of the Company; yet the Bill was (a) dismissed. (b) 2 *Ch. c.* 198.

(a) No Reason is given in the Book,

why the Bill was dismissed. But it may be observed, that no *Compensation* could be made, for it was impossible to ascertain what Damages might arise to the Company by such trading, by the Encouragement it would give to other People. (b) Nay it is doubtful, whether Equity would not enforce the Payment of the Penalty; for where the Company sued one of their chief Factors for an Account, and demanded a Penalty of five, six and seven Times the Value of the Commodities; upon a Plea, the Defendant was ordered to answer over, though it was a Penalty, 2 *Ch. c.* 219. though generally Equity will not enable a Man to recover a Penalty; and if a Bill is brought for Performance of a Thing, for which a Penalty is recoverable at Law for the Non-performance, the Plaintiff must by his Bill wave all Benefit of Forfeiture, else it is good Cause of Demurrer, *Vern.* 60. though *Vide* 2 *Ch. c.* 241. Where a Widow promised, for one Guinea, to pay ten when she married; the Bill was for a Discovery of the Promise; it was demurred, for that it was in Nature of a Penalty; but overruled, on a Difference between a Bond penal, where the Jury can give no less than the Penalty, and this Case where Jury will, as Cause is, lessen, &c.

(c) Conditions binding Creditors; if they were not intended originally to

(15.) If a Deed of Trust is created for Payment of such Creditors as come in within a Year; a (c) Creditor will not be excluded, tho' he doth not come in till after the Year. *Vern.* 260, 319.

regard them, are generally relieved in Equity; as if a Lease is made, upon Condition not to assign without Licence of the Lessor; and the Lessee dies indebted, and his Executors sell it for Payment of Debts; Equity will relieve against the Forfeiture. 1 *Ch. c.* 170.

Maxim XIII.

Equity regards not the Circumstance, but the Substance of the Act.

(1.) **E**quity will enforce the Performance of (a) Agreements in (b) Specie; as Equity looks upon Articles for a Purchase of Lands, equal to a Conveyance; for if the Purchaser dieth before the Conveyance executed, and deviseth the Lands, they pass in Equity. 1 Ch. c. 39. So where the Husband, when he proposed the Treaty of Marriage, offered to settle

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500 l.

(a) But if the Agreement be extremely unreasonable, Equity will not execute it. *Vide Max. 2. c. 2.* So also if it be not obtained with all imaginable Fairness. As

where the Plaintiff obtained Articles from the Defendant for the Purchase of his Estate; but the Defendant apprehending, and being informed by the Plaintiff at the Time of the Agreement, that the Contract was made for *f. s.* and under such an Apprehension sold the Lands somewhat cheaper; the Court could not decree a Performance of the Articles. *Vern. 227.* So where a Purchase was had at an extravagant Price from an Heir, of a Remainder in Tail after the Death of his Father, and there being a Covenant for farther Assurance, the Bill was to have him perform his Covenant *in Specie*, and to be decreed to levy a Fine: The same Lord Chancellor who would not set aside the Purchase for Fraud, yet would not decree a Performance of the Covenant, declaring, that he would in no Sort countenance the Practice of purchasing from Heirs in Necessity. *Vern. 167, 271.* But Equity seems not much to regard the Consideration upon which Agreements are entred; as the Testator seized in Tail of Freehold Lands, and in Fee of Copyhold Lands, devised the Copyhold Lands to the Defendant, who was entitled to the Remainder of the Freehold Lands; and devised the Freehold Lands to the Plaintiff. The Defendant apprehending there had been a Recovery suffered by the Testator, agreed without any valuable or other Consideration with the Plaintiff, that each of them should enjoy the Lands respectively according to the Will: But discovering after, that there had been no Recovery suffered, brought his Action to recover the Freehold Lands: But the Plaintiff brought his Bill to establish the Agreement, which was decreed accordingly. 1 Ch. c. 84. So where a Man after Marriage voluntarily gave a Bond to settle a Jointure, which he did, and thereupon the Bond was delivered up. After his Death the Jointure-Lands were evicted; the Court decreed that she should recover her Dower, and what the same fell short of the Value of the Jointure, should be retained by her (who was his Administratrix) out of the personal Estate, for an Agreement, though voluntary, under Hand and Seal, ought to be decreed by this Court, *Vern. 427. Vide Max. 14. c. 16.* that a voluntary Conveyance shall be binding against the Party himself and his Heir; because the Volunteer has equal Equity with either of them, and having the Law shall prevail; but where there is only an Agreement or Covenant for such a voluntary Conveyance, that shall not be executed against the Heir, who has equal Equity with a Volunteer, (*Vide Max. 14. c. 15.* and the Notes there) though by the foregoing Case it appears, that a voluntary Bond, delivered up shall be set up against the next of Kin, who by Law are entitled to the *Residuum*. (b) The Plaintiff assigned some Shares of the Excise to the Defendant, who thereupon covenanted to save him harmless, and to stand in his Place touching all Payments to the King. The Plaintiff being sued by the King, brought his Bill to have a Performance of the Covenant *in Specie*. And although it was insisted, that the Plaintiff might recover Damages at Law, yet it was decreed, that the Defendant should perform his Covenant; and directed it to a Master, that as often as any Breach should happen, he should report it Specially, that the Court, if Occasion should be, might direct a Trial in a *Quant' damnificat'*. *Vern. 190.*

500 *l. per Ann.* Jointure ; and after the Marriage, took Notice that the Jointure settled was not so much, and talked of making it up so much ; although there was no (a) Covenant or Agreement proved whereby he bound himself to make a Jointure of that Value, yet the (b) Heir was decreed to make it up. *Vern.* 17. So where the Husband covenanted that the Lands settled on the Wife for her Jointure were 400 *l. per Annum*, whereas there were but 350 *l.* the Court decreed the Heir to perform the Covenant *in Specie.* (c) *Vern.* 217. So where the Father by Letter offered to give 1500 *l.* with his Daughter in Marriage, to be raised out of his Lands at C. Upon a Bill by the Husband for the Money, although it was insisted, that the Plaintiff had good Remedy at Law, yet it was answered, that he was proper in Equity, to charge the Lands, by Virtue of the Agreement ; which was so decreed. *Vern.* 201. So where a Woman promised the Plaintiff, who pretended a Title, and threatned to evict her, that if she died without Issue she would either give him 500 *l.* or leave him the Lands ; she married, and dying without Issue, devised the Lands to her Husband ; the Court decreed the Agreement to be executed ; although it was insisted, that a Remainder after an Estate-Tail is so remote, that such an Agreement should never be executed in Equity ; for if the Wife had by Deed settled it so in her Life-time, she might by a Recovery have doct the Remainder. *Vern.* 48. So where A. upon the Marriage of his Brother, executed a Writing by which he promised, that if the Wife be worth 160 *l.* then if A. dies without Issue, he will give his Lands to his Brother and his Heirs ; and for the true Performance thereof, binds himself and his Heirs : And the Wife is worth 160 *l.* and A. afterwards marries, and settles the Lands in Jointure upon his Wife, and dies without Issue, though the Limitation was to take Effect after the Death of A. without Issue, and so if such Settlement had been made in the Life of A. it had been (d) subject

(a) For a Covenant is but an Evidence of the Agreement ; and therefore if there be any other Evidence which proves the Agreement, it is as good.

(b) For an Heir has not equal Equity with a Purchaser, which a Jointress is. *Vide Max 14. c. 15. the Notes there.*

(c) But the Value of the Lands were to be estimated, as they were at the Time of the Jointure settled, and not according to the present Value, Lands being now fallen every where. *Vern.* 218.

(d) So Note ; an Agreement in Equity was better than a Conveyance at Law.

subject to be defeated; yet because it was proved, the Marriage was had in Expectation of the Performance of this Agreement, the Lands were decreed to the Brother. 2 Ventr. 353.

(2.) Defects of (a) Circumstances in Conveyances are frequently supplied in Equity; as in Case of a Defect of Livery and Seisin. If a Man sells Lands in two Counties for Money and maketh Livery in one only, he shall be compelled in Conscience to perfect the Assurance, for the Conveyance faileth in a Circumstance or Ceremony. Car. 24. So if a Feoffment is made in Consideration of Marriage, but no Livery and Seisin thereon given: Equity will decree the (b) Heir to make Livery and Seisin. 2 Ch. Rep. 216. So in Case of a Defect of a Surrender of a Copyhold Estate. As where the Plaintiff contracted for the Purchase of a Copyhold Estate, and paid the Purchase-Money; but the Vendor died before a Surrender could be had; his Heir was decreed to Surrender. 2 Ch. Rep. 218. So where the Surrender was out of Court, and the Purchaser died before Admittance, and devised all his Copyholds to J. S. the Court declared it was clear, the Copyholds contracted for passed by the Will. 1 Ch. c. 39. So where there was no Surrender at all to a Mortgagee. 1 Ch. c. 70. So where the Surrender was but into the Hands of one customary Tenant only. (c) Vern. 132. So the Defect of the Trustees joining in the Conveyance shall be supplied in Equity. As where a Man seised in Fee of 36 Shares of the New River Company, convey'd the same to Trustees to the Use of himself for Life, and afterwards

(a) Even Mistakes in Deeds are amended in Equity; as the mistaking of a Name of a Corporation helpen in Equity. Totb. 131. So Leases made by a Dean and Chapter, Mifreciting the Name of their Corporation; the Lord Chancellor said, that it was fit to help such Cases in Chancery. Car. 44. So of a Misnomer of a Corporation in a Will. 1 Ch. c. 267. So the Word *quadrigent* instead of *quadrant*, in a Bond, was supplied against the Heir. 2 Ch. c. 225. So a Counter-Bond to save harmless against a Bond of 200*l*. Whereas the Bond was but

for 100*l*. relieved in Equity. Totb. 131. So where the Words (*shall stand and be seised*) were left out in a Conveyance made in Pursuance of Marriage-Articles; these Words were supplied against the Heir, and the Plaintiff decreed to enjoy, as if those Words had been inserted. 1 Ch. Rep. 162. But where A. had a Term for Years, and ordered a Scrivener to make an Assurance thereof to B. rendring Rent, and the Scrivener grants the entire Term rendring Rent, A. shall have no Remedy in Equity for the Rent; for if the Assurance is bad, and yet there is Remedy in Equity, to what Purpose is the Common Law? 2 Rol. Rep. 434. And it was said, that if the Scrivener acted contrary to his Orders, an Action lay against him. (b) For An Heir has not equal Equity with a Purchaser. Vide Max. 14. c. 15. the Notes there. (c) This was in Favour of younger Children against the Heir, who has not equal Equity with younger Children. Vide Max. 14. c. 15. the Notes there.

wards, out of the Rents and Profits to pay Daughter's Portions, and after to permit J. S. and his Heirs to take the Profits; he ascertains the Daughter's Portions and dies, and J. S. entered into an Agreement for the Sale of 14 of the Shares, the Trustees not joining; altho' it was insisted, that the Trustees were no Parties; yet it was decreed the Contract should be performed. 1 Ch. c. 173, 208. So where *Cestuy que Trust* in Tail, being in Possession under the Trustee who had the Freehold in him, suffers a Recovery, in which he himself is the Tenant, and so no good Tenant to the *Præcipe*; yet this shall (a) bar the Remainder in Fee of the Trust.

(a) In the Case of *Goodrich and Browne* it was resolved that the Recovery of a *Cestuy que Trust* should Bar and transfer the Trust, as it should an Estate at Law, if it were upon a Consideration. 1 Ch. c. 49. But in the Case of *Lord Digby and Langworth*, it was doubted, whether Tenant in Tail of a Trust, Remainder in Tail to another, could by a Recovery Bar the Remainder.

1 Ch. c. 68.

So in the Case of *Washburne and Downes* the same Point was doubted. 1 Ch. c. 213. (b) For otherwise Trustees by refusing, or not being capable to execute their Trust, might hinder the Tenant in Tail of that Liberty to dispose of his Estate, and bar the Remainders, which the Law gives him as incident to his Estate, which would be manifestly inconvenient, and tending to the Introducing *Perpetuities*. 2 Ch. c. 71. (c) It was offered by the *Counsel*, that where Tenant in Tail did bargain and sell his Estate, that seeing he had Power over it, notwithstanding there were no Fine or Recovery, a Court of Equity should decree against the Heir. But Lord *Chancellor* said, he would not supersede Fines and Recoveries; but where it was a Trust and an equitable Interest, it was a Creature of their own, and disposable by their own Rule; otherwise where the Entail was of an Estate in the Land. 2 Ventr. 350. (d) Note; the Court declared it was a general Rule; that any legal Conveyance or Assurance by a *Cestuy que Trust* shall have the same Effect and Operation upon the Trust, as it should have had upon the Estate in Law, in Case the Trustees had executed their Trust, 2 Ch. c. 78. and therefore the

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Lands; the Court enclined to enforce the Agreement against the Issue. 1 Ch. c. 236.

Court took a Difference, that if there be a Cestuy

que Trust of a Trust for Life before the Trust in Tail; so that in Case the Estate in Law had been executed according to the Trust, and consequently the Tenant in Tail could not have barred the Remainder in Fee, if he had suffered a Recovery; there the *Cestuy que Trust* in Tail shall not bar the Remainder by a Common Recovery, if there is no Tenant to the *Præcipe*. 2 C. c. 64. from whence it should seem, that the Agreement even of Tenant in Tail in Equity, should not bind his Issue, since it would not bind the Estate at Law, in Case the Trustees had executed their Trust. Yet the Court said, that though Tenant in Tail in Trust cannot bar the Remainder by Fine, yet if he makes a Feoffment or Bargain and Sale, he may bar his Issue, 2 Ch. c. 64. and thought a Feoffment or Bargain and Sale would work as a Fine. Vern. 14.

(3.) *Defects of Circumstances in the Execution of Powers are supplied in Equity*, as in Cases of *Powers of Revocation*. Where a Man had a Power of Revocation, by any Writing published under his Hand and Seal in the Presence of three Witnesses; he made his Will under his Hand and Seal, wherein he recited his Power, and declared that he revoked the Settlement, but the Will had but two Witnesses, though a third present; Lord Chancellor said, here was an (a) Execution of the Power in Strictness, though the third Witness did not subscribe. 2 Ventr. 350. S. C. 2 Ch. Rep. 212. So in Cases of *Powers to sell Lands*. If a Man gives Instructions to put his Will in Writing, and that his Messuages, &c. should be sold by A. and B. for Payment of his (b) Debts and (c) Legacies, and died, and after A. died, B. and the Heir were compelled to sell. Hard. 204. So where the Will was, that the Executors should sell the Lands for Payment of his Debts; the Executors did not sell; it was decreed that the Heir should sell. 1 Ch. Rep. 168. So where no Person was named to sell, the Heir was decreed to do it. 1 Ch. c. 176. S. C. 1 Ch. Rep. 283. So where Lands were devised to A. for Life, and after to his Executor to be sold for younger (d) Children's Portions, and the Executor dies, and then A. dies, yet the Estate shall be sold. 1 Ch. c. 35. So where the Time for the Sale of Lands by the Trustees was elapsed, so that they had no Power to execute the Trust, the Trustees were decreed to proceed with the Sale notwithstanding. 1 Ch. Rep. 183. So in

(a) This was decreed against the Heir in Tail under the Settlement in Favour of a Mortgagee; for an Heir has not equal Equity with a Creditor. Vide Max. 14. c. 15. the Notes there.

(b) For the Heir has not equal Equity with a Creditor. Vide Max. 14. c. 15. the Notes there.

(c) As to this Case of Legatees; whether Equity will supply a Defect in Favour of them, who are but Volunteers. Vide Max. 14. c. 15. the Notes there.

(d) For the Heir has not equal Equity

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with younger Children. Vide Max. 14. c. 15. the Notes there.

(a) There is a Difference where a Man has Power to charge or incumber a third Person's Estate; such Powers are to have a rigid Construction; but where the Power is to charge a Man's own Estate, it is to have all the Favour imaginable. 2 Ventr. 350. (b) For the Heir has not equal Equity with younger Children. Vide Max. 14. c. 15. the Notes there. But such a Power so defectively executed, shall not be made good against a Purchaser without Notice, with whom younger

Cases of Powers to (a) charge Lands. If a Man hath Power, by Deed or Will in Writing under his Hand and Seal, to charge Lands with 500*l.* and he by Will devises the 500*l.* to (b) younger Children, but the Will was not sealed; yet the Court decreed the Devise good against the (c) Heir in Tail under the Settlement. 1 Ch. c. 263. So where a Man had Power by Deed or Will to charge Lands with 500*l.* he sends Instructions for a Conveyance to charge them for younger Children's Portions; the Court decreed the 500*l.* to the younger Children against the Heir in Tail. 1 Ch. c. 264. So in Cases of Powers to (d) limit Lands: As if a Tenant for Life has a Power to make a Lease in Possession, but makes it to commence from a future Time; this shall be (e) good in Equity. 1 Ch. c. 10. S.C. 1 Ch. Rep. 185. So if a Man hath Power to lease for ten Years, and he leaseeth for twenty, this in Equity is good for ten Years. 1 Ch. c. 23. So where a Devise was to *J. S.* for Life, Remainder to his first and other Sons in Tail, Remainder to the Defendant for Life, &c. with Power to *J. S.* to limit and appoint a (f) particular Part of the Lands at

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er Children, being Volunteers, have not equal Equity. Vide Max. 14. c. 16. the Notes there. (c) An Heir in Tail under a voluntary Settlement, was decreed to have equal Equity with younger Children, who were also Volunteers. 1 Ch. c. 159. but *Quere*, and Vide Max. 14. c. 15 the Notes there; and Max. 14. c. 16. (d) Feme Sole settled her Lands on her self for Life, Remainder in Tail; with Power for her, being Sole, to make Leases for three Lives in Possession. The Feme marries, and then she and her Husband make Leases for Twenty-one Years to commence from the Date, for Payment of Debts, &c. as was alledged. Per *Bridgman*, C. J. the Power is not pursued; for by the Marriage she hath put her self in the Power of her Husband; and it is the Deed of her Husband, and not hers; and he took a Diversity between a naked Power and a Power which flows from an Interest; for when a bare Power is given to a Feme by Will, to sell Lands, although she marry, she may sell, and may sell the Lands to her Husband, because it was not created by her self out of any Interest of her own. But where a Feme upon a Settlement of her own Estate, reserves a Power which flows from an Interest, that Power ought to be executed by the Feme Sole, and if by Baron and Feme, it is not good. And yet he said such Powers ought to be taken liberally, though formerly they were taken strictly. (Vide 2 Ventr. 250. that a Power over a third Person's Estate is to be strictly pursued; not so, if over one's own Estate). *Hale* doubted; the Chancellor concurred with *Bridgman*, and the Bill was dismissed. 1 Ch. c. 17. and Vide Max. 14. c. 16. Where a Power to convey Lands, not strictly pursued, though in Favour of younger Children, not supplied against the Heir in Tail, though a Volunteer. (e) This was against the Lessor in Favour of a Creditor. (f) But where the Power was generally to settle a Jointure, and not said of any Lands or Sum in particular; although there is a Covenant to settle a Jointure, which is not done; yet it shall not be made good against the Jointress of the Remainder Man, who is equally a Purchaser with the first; for being a general Power to make a Jointure, and not said of what Lands in particular, is not such a Lien upon the Lands as will affect a Purchaser, though the Power had been afterwards executed; much less where it was not executed at all; for as a Man by such general Power might make a Jointure of 500*l.* per Ann. so he might make a Jointure of 50 or 5*l.* per Ann. And there is a great Difference between a defective Execution of a Power, and where the Power is not executed at all. Vers. 406. Vide Max. 14. c. 16. the Notes there.

at F. to any Wife. 7. S. precedent to his Marriage with the Plaintiff, in Consideration of a Portion paid, covenanted to settle Lands of 300*l.* *per Ann.* for her Jointure, but no particular Lands were specified; he dying before he made the Jointure, the Question was whether the Plaintiff could be relieved out of the Power, for else there was not sufficient for the 300*l.* *per Ann.* either out of his real or personal Estate; the Court inclined strongly for the Plaintiff in Regard of the Consideration; for if he had *de facto* executed his Power, and mist in Time or other Circumstance to have (a) done it well, the Defect would have been supplied in Equity. 2 *Ch. c.* 29, 30, 87.

(a) *Vide* Lord
Coventry's
Case reported
at large,
at the End of the Book.

(4.) *Defects of Circumstances in the Performance of Conditions are supplied in Equity.* As (b) where a Devise was of Lands to the Plaintiff and his Heirs Male; but declared his Will to be, that the Plaintiff shall have no Benefit of this Devise, unless the Plaintiff's Father should settle upon the Plaintiff two full Thirds of his Estate, settled on the said Father on his Marriage. The Father devised all his Estate to the Plaintiff his Son; in the first Place for Payment of his Debts, and then to the Plaintiff for Life, Remainder to his first and other Sons in Tail, &c. Although by the Will, he was Tenant for Life only, whereas by the Condition he was to have a greater Estate, *viz.* either a Fee-simple, or a Fee-tail, it being in Case of a Will; yet the Court conceived, that it was well enough, and better answered the Testator's Intent, than if the Condition had been literally performed; and declared, that if the Substance of the Condition was performed, it should serve turn. *Vern.* 79. So where the Marriage was to be with the Consent of the Father under a (c) Penalty or Forfeiture of the Portion; the Father came to a Treaty for her Marriage, and her Jointure was agreed to, and Directions given to draw the Writings accordingly. But before the

(b) *Vide* this
Case. *Max.*
12. c. 9.

(c) *Vide* *Max.*
12. c. 7.

(a) But if she steals away, and is married without the Knowledge of the Trustees, and all of them, as soon as they heard of it, protest against it; but afterwards consent to it, and by their Answers swear that they did not know, but that if their Consents had

been asked before, there might have been some Reasons given, that they might have assented; yet this was not sufficient. 1 Ch. c. 138. S. C. 1 Mod. 300.

the Assurances were perfected, the young Couple married without the Knowledge of the Father: The Court was of Opinion, that the Marriage having taken Effect in such Manner, ought in Equity and Justice to be esteemed a Marriage with the Consent of the Father, in respect there was an express Consent of the Father, both (a) before and after the Marriage consummated, and no Disagreement or Alteration of his good liking in the mean Time. 1 Ch. Rep. 1. So where the Consent was to be had in Writing, and it was had only by *Parol*, this was deemed sufficient, because it was only a provident Circumstance. 1 Mod. 310. So where the Consent of the Overseers of the Will was to be had, the Consent of the *major* Part was decreed to be sufficient. 2 Ch. Rep. 24. So where the Marriage was to be by Consent, and she married by Consent; but after married a second Husband without Consent; this second Marriage was no Breach of the Condition. 2 Ch. Rep. 366.

Maxim XIV.

Where Equity is equal, the Law must prevail.

(1.) **A** (a) Judgment-Creditor exhibited a Bill against a prior Conusee of a Statute, who had extended the Lands, to have a Discovery of what was due upon the Statute; and on Payment thereof, to have the same set aside; the Defendant pleaded, that after he had extended the Lands, he came to an Account with the Conusor; and in Consideration of what was due to him, the Conusor made an absolute Conveyance to him of Part of the Lands, and that so he was a Purchaser without (b) Notice of the Defendant's Title, for a valuable Consideration; the Plea was allowed. 1 Ch. c. 36. So where a like Bill was by a Judgment-Creditor, to discover Lands subject, &c. not knowing the Place, nor who Tenants: The like Plea was allowed. 2 Ch. c. 47. So if an (c) Assignee of a Bankrupt exhibits a Bill to discover the Bankrupt's (d) Goods, the Defendant may plead, that he has no Goods of the Bankrupt, or that ever were his, but what he bought for a full and valuable Consideration, *bona fide*, and that at the Sale or Payment of his Money, he had no No-

(a) It was objected, that the Plaintiff's Judgment being of Record, the Defendant ought to take Notice of it at his Peril; but it was answered and so ruled, that though Judgments were on Record, and a Purchaser is bound to take Notice thereof at Law, yet in Equity, where the Conusee of a Judgment comes to be help'd to extend his Judgment against a Purchaser, he must prove express Notice of the Judgment in

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the Purchaser, or else shall never be relieved against him. 1 Ch. c. 36. but a Purchaser is bound to take Notice of a Decree, and why not so of a Judgment at Law? *Quer*, the Difference. 2 Ch. c. 48. But in what Cases a Purchaser is to take Notice; in what Cases an implied Notice shall bind him; and in what Cases Notice to the Agent shall be Notice to the Principal, &c. is too large to be here inserted. (b) The Notice must be very plainly denied; for where the Defendant denied Notice at the Time of the Purchase, because the Word *Purchase* might be understood, where the Contract for the Purchase was made; and it might be he had no Notice then, and might have Notice after, before or at the Sealing of the Conveyance; and if there was any Notice before the Conveyance executed, that should charge him; therefore the Plea was over-ruled. 1 Ch. c. 34. So the Notice ought to be denied in the Answer, and not in or by Way of Plea. 2 Ch. c. 161. Whether Notice ought to be denied, although it be not charged. *Vide* 2 Ch. c. 252. (c) 2 Ch. c. 156. S. P. but a Discovery ordered, in case the Plaintiff would consent to take no Advantage thereof at Law, but in this Court only. (d) So where to discover the Bankrupt's Lands, the Defendant may plead he is a Purchaser, &c. 2 Ch. c. 136.

tice of the Bankruptcy, 2 Ch. c. 135. S. C. Vern. 27. for it is an infallible Rule, that a Purchaser for a valuable Consideration without Notice, shall never discover any Thing to hurt himself. 2 Ch. c. 73.

(2.) It is the constant Justice of a Court of Equity, that if a Purchaser buys in an *Eigne* Incumbrance, Statute or Judgment, and there was a Judgment or Statute *mesne* between that and his Purchase, of which he had no Notice at his Purchase, he shall (a) protect his Purchase with the *eigne* Incumbrance so bought in, 1 Ch. c. 36. S. P. though he bought in the *eigne* Incumbrance after he had Notice of the *mesne* Incumbrance, 2 Ventr. 339. and it is the same Case; if he had first bought in the *eigne* Incumbrance, and then having (b) no Notice of the *mesne* Incumbrance, purchase the Lands; he shall protect his Purchase by such *eigne* Incumbrance, Vern. 52. for it is the purchasing without Notice, that gives him equal Equity with the *mesne* Incumbrancer, and therefore the Buying in the *eigne* Incumbrance before or after the Purchase can make no Difference.

(a) By protecting is meant making all Advantages of the Incumbrance, which the Law admits of; as if it was paid off, yet if he can make use of it at Law, Equity will not hinder him. 2 Ch. c. 208. If there has been an Extent upon such Incumbrance, he

shall not account in Equity otherwise than at Law; and though the Lands are extended but at a third Part of the Value, yet because at Law in a *Sci' fac' ad computand'*, he shall account but according to the extended and not the real Value, he shall not in Equity be obliged to account otherwise. 2 Ventr. 338. But he shall not be further or longer protected by an Incumbrance bought in, than 'till such Time only, as he has received so much of the Profits as will satisfy that Security, and then the same shall be avoided by a *Sci' fac' ad computand'*, or by an Account to be taken in this Court. Vern. 52. (b) Though in the other Case he might have Notice of the *mesne* Incumbrance, when he bought in the first; yet in this as well as the other Case, it seems he ought to have no Notice of the *mesne* Incumbrance when he purchased the Lands; and though by the Case, Vern. 49, &c. it seems as if he had Notice of the *mesne* Incumbrance when he purchased the Lands, yet I cannot conceive how he can have equal Equity with, or can insist on any Advantage at Law against an Incumbrancer, of whose Debt he had Notice at the Time of his Purchase; for in all the Cases, where a Purchaser or Incumbrancer claims to have equal Equity with a precedent Incumbrancer, it is always, upon the Reason of his not having Notice of such precedent Incumbrance. Vide ant. c. 1. post. c. 6, 7, 8, 9. and Lord Chancellor's saying in this Case, Vern. 52. is observable; that it would be a Precedent of mischievous Consequence, that a Man having bought in a prior Incumbrance, and having Notice of a subsequent Statute, should then purchase the Land with this Notice; and yet have any Favour or Protection shewn him in it. But if the Case be rightly reported as to the Point of Notice, *a fortiori* he shall so protect his Purchase, if he had not Notice.

(3.) A Purchaser came into a Man's Study, and there laid Hands on a Statute, that would have fallen upon his Estate, and put it up in his Pocket; and in that Case he having thereby obtained an Advantage at Law, though so unfairly and by so ill a Practice, the

Court would not take Advantage from him; Sir *John Fagg's* Case cited by the Lord Chancellor, *Vern.* 52.

(4.) *J. S.* surrendered Copyhold Lands to the Plaintiff by Way of Mortgage. But there was a Failure to present the Plaintiff's Surrender at the next Court; afterwards *J. S.* surrendered them to the Use of his Will, and then by Will devised them to the Defendants, his Wife for Life, Remainder to his Daughter in Fee, and died; the Wife got her self admitted; the Bill was, to set aside this Surrender and Will, being voluntary against a Creditor. But the Wife proving there was an Agreement of the Husband in Consideration of Marriage, to settle the Premises on her for Life; and thereby having equal Equity with the Plaintiff; no Relief was had against (a) her. 1 *Ch. c.* 170.

(a) But as against the Daughter,

who was but a Volunteer, and hath not equal Equity with a Creditor, (*Vide post. c.* 16. the Notes there) he was relieved; and it was ordered, that unless she would pay the Plaintiff his Money, he should hold and enjoy the Premises as against her.

(5.) The Plaintiff set up a Title by an old Entail; and complained that the Defendant had got the Evidences and the Settlement, and concealed the same; and to have a Discovery of the Deed of Settlement, and the same to be delivered up, was the End of the Bill; the Defendant pleaded, *that for 6370 l. really paid, he purchased the Premises, and demanded Judgment, whether he shall further discover his Title, or any Deeds or Evidences to weaken it; the Plea was allowed.* (b) 1 *Ch. c.* 68.

(b) For a Creditor has equal Equity with the Heir

in Tail. But the Heir has not equal Equity with him. *Vide post. c.* 15. the Notes there

(6.) Tenant in Tail mortgaged the Lands and married; and to enable him to settle a Jointure, suffered a Recovery; and after took up more Money of the Mortgagee upon the same Security; the Mortgagee shall be (c) allowed against the Jointress, the Money lent after the Recovery and Marriage, provided he had

(c) As by the former Cases, *c.* 1, 2, 3, it appears that no a Purchaser has equal E-

quity with a Creditor, so by this it appears, that a Creditor has equal Equity with a Purchaser.

Maxims of Equity.

no Notice of the Jointure, when he lent the Money.

1 *Ch. c.* 119.

(7.) The Husband by Articles precedent to the Marriage, agreed to settle the Lands on the Wife for her Jointure; after the Marriage had, he did not make a Conveyance in Pursuance of the Articles, but mortgaged the Lands to one who had no Notice of the Articles; the Wife could not have the Articles executed against the (a) Mortgagee. 2 *Ventr.* 343.

(a) For a
Creditor has
equal Equity

with a Purchaser, *vide* the preceding Case; but the Articles were executed against the Heir, who has not equal Equity with a Purchaser. *Vide Max.* 13. c. 1. and *post.* c. 15. the Notes there.

(8.) If the Estate is first mortgaged to A. then to B. and then to C. without Notice of the former Mortgages; if C. (b) buys in the Mortgage of A. he shall hold the Estate against B. until he be satisfied the Money be (c) paid to A. as also his own Money lent on the last Mortgage; (d) *per Hale C. B.* 2 *Ventr.* 338. *S. P. Vern.* 187.

(b) It was
strongly in-
sisted at the
Bar, that this
Trade of
buying in In-
cumbrances
was in Truth

a Thing against Conscience, and contradictory to many established Rules of Law and Equity. But Lord *Keeper* declared he would not change the Rule, that had so long prevailed in this Case; but it may be he might do so, where he found a Man designing a Fraud, and thought to make a Trade by Cozening by the Rules of the Court. *Vern.* 187, 188. (c) For he shall be allowed no more on A's Mortgage than he really paid, tho' it is not so much as was really due upon it. *Vide Max.* 3. c. 1. and *post.* c. 10. the Notes there. (d) For one Creditor has equal Equity with another.

(9.) If a Man is seised of sixty Acres, and mortgages twenty to A. and then mortgages the whole to B. and then mortgages the whole to C. and afterwards C. purchaseth in the first Mortgage; That shall not protect more than twenty Acres; but it shall protect those twenty Acres, so as B. shall never recover them until he pay C. all the Money upon the first and last Mortgage; *per Hale C. B.* 2 *Ventr.* 339. And if A. is seised in Fee of the Manors of B. and C. and mortgages Part of the Manor of B. to D. and after acknowledges a (e) Statute to D. and after mortgages both Manors to E. and then mortgages the Manor of B. to F. who had no Notice of the prior Mortgages; and after F. having (f) Notice

(e) *Vide* 1 *Ch.*
c. 149, 150.
2 *Ch. c.* 20,
35, 213.

(f) For he
purchased
the two first
Incumbran-
ces, pending
a Suit in

Chancery by E. against A. 1 *Ch. c.* 162, 163.

Notice purchases in both the Incumbrances of *D.* now *F.* hath both Law and Equity, and shall hold the Lands included in the first Mortgage, until he is satisfied not only the Money paid *D.* but also the Money lent on the last Mortgage; but the first Mortgage can protect no more than what is included in that Mortgage; and as to the Statute *F.* shall not account in Equity, otherwise than he would be obliged to do at Law upon a *Sci' fac' ad computand'*, which is according to the extended Value, unless he hath received enough to satisfy his own Mortgage also. (a) And if according to the extended Value, the Money upon the Statute hath been received, or if *E.* will pay the Residue, or so much as the Proportion of the Manor of *C.* will come to, that Manor ought to be discharged of the Statute: Between *Marlb* and *Lee*, 2 *Ventr.* 337. *S. C.* 1 *Ch. c.* 162.

(a) But as to the Manor of *C.* in which *F.* had no Estate before he bought in the Statute; the Court inclined that so much of *B.* as was not in *D.*'s Mortgage,

gage, (for he could not extend upon himself) should be accounted for at the real Value, in order to discharge the Manor of *C.* of the Extent; but not to prejudice the Extent in Course of Law as to the Manor of *B.* But that the Statute ought to protect the Manor of *B.* as far as by any Course of Law it might. 1 *Ch. c.* 168.

(10.) If an Heir or Trustee, buys in a precedent Incumbrance, he shall make use of it to protect a (b) subsequent Incumbrance of his own. *Vern.* 49. So of an Executor. 1 *Salk.* 155.

(b) But if he has no subsequent Incumbrance of his own, he shall be

allowed no more than what he really paid for it. *Vide Max.* 3. c. 1. And if both his Incumbrances may be paid off, then he shall be allowed no more than what he really paid for the first. *Vide ant. c.* 8.

(11.) If a Man having a defective Mortgage from the Father who is dead, by Contrivance and (c) Practice, draws in the Son and Heir, to give him the same Lands as a Security by Way of Mortgage, for a farther Sum; which Mortgage from the Heir is forfeited;

(c) So that the Practice is not material, being done to secure a just Debt.

S

Equity

2 *Ch. c.* 23. And Lord Chancellor de-

clared, that where a Man has a just Debt due and owing to him; if such a Man could by the strict and most precise Rules of the Court, get any Advantage of an Heir, &c. he would not be instrumental in depriving him of such Advantage, *Vern.* 47. though *vide* the Case of the Earl of *Huntington* and *Greenville*, where the Conussee of a Statute having extended the Lands, assigned them to the Plaintiff, who after purchased the Estate; the Defendant having a subsequent Statute, procured Administration to be taken out to the first Conussee, and Satisfaction to be acknowledged on the Statute by the Administrator, which was good at Law to discharge the Statute; yet the Court relieved against this Practice, and put the Plaintiff in the same Plight, as before Satisfaction was acknowledged. *Vern.* 49.

(a) But the Heir has not equal Equity with a Mortgagee, who is a Creditor. Vide post. c. 15. the Notes there.

Equity will not compel a Redemption of the last Mortgage, except the Heir will redeem his Father's Mortgage also. 2 Ch. c. 23. for the (a) Mortgagee has equal Equity with the Heir, and having the Advantage of Law by the Forfeiture of the Mortgage made by the Heir, Equity will not take such Advantage from him, except the Heir will take away such Equality of Equity, and give himself a greater Equity, by paying him both Mortgages. Vide this Case under Max. 1. c. 1.

(b) Note; In this Case, the Court of Equity did not stand Neuter, and let the Law take its Course,

(12.) If Baron and Feme by Fine mortgage the Wife's Land; and Part of the Money is paid, but the Mortgagors having Occasion again for Money, borrow the like Sum of the Mortgagee, as they had paid off, for which the Mortgage was agreed to be a Security, and an Endorsement made on the Deed for that Purpose; although no new Fine was levied on the second Loan, yet the Heir of the Wife was decreed to be (b) foreclosed, except he paid both Sums; for the Mortgagee hath good Title in Law, and as much Equity to the Money, as the Heir hath to the Land. 2 Ch. c. 98. S. C. Vern. 41.

which proves that the Mortgagee hath greater Equity than the Heir. Vide post. c. 15. the Notes there, that an Heir has not equal Equity with a Creditor.

(c) As by the two preceding Cases, it appears, that a Creditor hath Equity with an Heir in Fee-simple; so by this it appears he hath equal Equity

(13.) If A. acknowledges a Statute in the Penalty of 1500 l. to B. for Payment of 800 l. and Interest, which being forfeited, and the Lands extended upon it; A. for a valuable Consideration settles the Lands in Tail, and after borrows more Money of B. and by Articles it is agreed, that the Statute and Extent shall stand as a Security for the last Money: And after A. dies, and the 800 l. with Interest is satisfied by Perception of the Profits; yet the (c) Issue in Tail shall not be relieved against the Penalty of the Statute; for though the Heir has an Equity by Reason of the Tail made upon a Consideration; yet the Money lent raises an Equity for B. so that B. hath both Law and Equity,

with an Heir in Tail under a Settlement for a valuable Consideration. But an Heir in Tail under a Settlement, hath not equal Equity with a Creditor. Vide post. c. 15. the Notes there.

ty, whereas the Issue in Tail hath Equity only, 'till the Penalty is satisfied. *Hardr.* 318.

(14.) J. S. having two Nephews, the Plaintiff and the Defendant, who were his Heirs at Law, and intending to make an equal Division of his Estate between them, made a Conveyance accordingly; but in the Enumeration of particular Lands to the Plaintiff, a Farm was left out, which was proved to be intended to be given to him, and so the Scrivener swore his Instructions were; but it was omitted by the Clerk: The Bill was to supply this (a) Omission. But the Court would do nothing in it, but left the Farm to descend equally between them. *Vern.* 37.

(a) Omissions in Conveyances have been many Times supplied in Equity.

quity. *Vide Max.* 13. c. 2. the *Notes* there. But it has always been in Favour of a Purchaser or Creditor, and not in Favour of a Volunteer against an Heir; for *an Heir has equal Equity with a Volunteer.* *Vide* the next Case and the *Notes* there.

(15.) J. S. seised in Fee of Freehold and Copyhold Lands, settled the Freehold Lands on himself for Life, Remainder to the Heirs Male of his Body, Remainder to the Plaintiff his Brother in Tail; and covenanted to surrender the Copyhold Lands to the same Uses; and going to make a Surrender in Pursuance of his Covenant, fell sick by the Way, but made a Letter of Attorney to do it, and died before it was done, without Issue Male; the Copyhold Lands descending to Daughters, who were his Heirs at Law; the Bill was brought by the Brother to have the Defect of the Surrender supplied in Equity: But the Court refused it, for the Brother is but a meer Volunteer; and *the Heir at Law* (b) *has equal Equity with a* (c) *Volunteer.* 1 *Ch. c.* 2 43.

(b) But whether a Volunteer hath equal Equity with

the Heir, seems doubtful. Where the Husband devised the Lands to his Wife for Life; the Son suggesting an old Entail, under which he was Heir, brought his Bill against the Wife, who had the Title-Deeds in her Custody, for a Discovery of the Deed of Entail; although it was insisted for the Wife, that there was a Consideration in the Devise, viz. to provide for his Wife, yet because the Devise was a Bounty, and the Heir having good Title in this Case, he shall be aided, and decreed the Deed to the Heir. 2 *Ch. c.* 4. But where the Plaintiff as Heir brought a Bill to have the Deeds and Writings concerning the Estate; the Defendant being a Jointress, insisted that she ought not to discover or part with the Writings, until her Jointure was confirmed; although the Jointure was voluntary and made after Marriage, yet *per Cur.* Confirm the Jointure, or you shall not see the Deeds. *Vern.* 480. *Vide* farther as to this Point, *Max.* 13. c. 1. the *Notes* there, and *post.* c. 16. the *Notes* there, that a Volunteer having a Conveyance, the Heir cannot set it aside. (c) Yet to this there is an

Exception;

Exception; for the Heir has not equal Equity with younger Children, who tho' they are Volunteers, yet if unprovided for, shall be relieved against the Heir; for though generally a Defect in a voluntary Conveyance shall

So where the Defendant's Mother whose Heir he is, being seised in Fee, she and her Husband levied a Fine, under which the Plaintiff makes Title, viz. by the Husband's Will, the Fee being limited to the Husband; the Bill was for a Discovery of the Deed. But because the Conveyance by the Fine, &c. was voluntary and without (a) Consideration, no (b) Money being paid, the Court would give no Relief, but left the Defendant wholly to Law, to help himself there as he could. 2 Ch. c. 133.

not be supplied in Equity, yet if a Man voluntarily makes a Provision for his Children, and for their Maintenance, such a voluntary Conveyance shall be supported and made good in Equity. Vern. 40. S. P. 2 Ventr. 365. As the defective Surrender of a Copyhold supplied against the Heir in Favour of younger Children. Vern. 132. S. P. 1 Salk. 187. So where Lands were devised to A. for Life, and after to the Executor to be sold for younger Childrens Portions; and the Executor dies, and then A. dies, the Estate shall be sold. 1 Ch. c. 35. So a Defect in a Power to charge Lands, was supplied against the Heir in Favour of younger Children. 1 Ch. c. 263, 264. So also in the Case of Legatees, the Heir seems not to have equal Equity with a Legatee. As a Man gave Instructions to put his Will in Writing, and that his Messuages, &c. should be sold by A. and B. for Payment of his Debts and Legacies, and died; and after A. died; B. and the Heir were compelled to sell. Hardr. 204. And where Lands were devised to be sold for Payment of Legacies, but not directed by whom to be sold; the Legatees sold their Interest to the Plaintiff who exhibited a Bill against the Heir, to compel a Sale; it being upon a special Verdict adjudged by the Court of Law, that the Will was void in the very Constitution of it; the Court of Chancery dismissed the Bill; but the Dismissal was reversed in the House of Peers. 1 Ch. c. 176. S. C. 2 Ch. Rep. 283. but if the Heir be Devisee of the Lands, those Lands shall not be made chargeable in Equity with the Legacies, for one Volunteer has equal Equity with another. Vide post. c. 16. (a) Marriage even without a Portion paid is a sufficient Consideration, to give the Grantee greater Equity than the Heir; as Articles, or a Covenant, or even a bare Promise before Marriage to settle a Jointure shall be executed in Equity against the Heir. Vide Max. 13. c. 1. So where the Words (shall stand and be seised) were left out in a Conveyance made in Pursuance of Marriage-Articles; those Words were supplied against the Heir. 1 Ch. Rep. 162. So a Feoffment made in Consideration of Marriage; Livery and Seisin was supplied against the Heir; 2 Ch. Rep. 216. but Note, a Jointress is a Purchaser. 1 Ch. c. 100. (b) For an Heir hath not equal Equity with a Purchaser or Creditor. As Marriage-Articles shall be executed against the Heir. Vide Max. 13. c. 1. and ant. c. 7. the Notes there. Defect of Words, or Mistake in a Conveyance supplied against the Heir in Favour of a Purchaser or Creditors. Vide Max. 13. c. 2. the Notes there: Defect of Livery and Seisin supplied against the Heir in Favour of a Purchaser. Vide Max. 13. c. 2. Defect of a Surrender of a Copyhold Estate supplied against the Heir in Favour of a Purchaser or Mortgagee. Vide Max. 13. c. 2. Defect of Trustees joining in a Conveyance, supplied in Favour of a Purchaser. Vide Max. 13. c. 2. Defect in the Execution of a Power supplied against the Heir in Tail in Favour of a Mortgagee. Vide Max. 13. c. 3. Defect of a Devise to sell Lands to pay Debts, supplied against the Heir, Vide Max. 13. c. 3. but not against a prior Volunteer. Vide post. c. 16.

(16.) The Question being between two voluntary Deeds; the Plaintiff claiming by the later, the Court ordered the Plaintiff to produce Precedents, where a former voluntary Conveyance hath been set aside, as this Case is, that a subsequent Conveyance, which is also voluntary, may take place; the Bill was dismissed.

1 Ch. Rep. 173. So where the Grandfather voluntarily settled the Lands on the Father for Life, Remainder to the Father's Wife for her Life, Remainder to his first Son in Tail; and by the Settlement a Power was given to the Father at any Time during his Life, by any Writing to convey or appoint the Lands to any Child or younger Children, so as that Conveyance or Appointment be made to commence *after the Death of the Wife*. The Father had Issue two Daughters the Plaintiffs, and a Son the Defendant, and having no other Way to provide for the Plaintiffs, conveyed the Lands to a Trustee, *Habendum* to him and his Assigns, for the Lives of his Daughters, and for their only Use and Benefit; to remain from the Death of *himself* and his Wife, whereby the Power was not literally pursued; the Bill was to supply this Defect, but the Defendant demurred, for that both the Conveyances were voluntary, and therefore the Case was the same here as at Law; and the Court was all of Opinion, that the Law being against the Plaintiffs, Equity could not

(a) help. (b) 1 Ch. c. 156. So a Man having a Term in Trustees Names, made a voluntary Settlement of it upon the Defendant, but being afterwards (c) dissatisfied with the Settlement, made his Will and devised it to the Plaintiff; the Settlement prevailed against the Will. *Vern.* 100. So where a Man in the Time of his Sickness, made a voluntary Surrender of a Copyhold Estate, but afterwards recovering and marrying,

T

set-

(a) This Case seems doubtful; because an Heir has not equal Equity with younger Children. *Vide ant. c. 15.* the Notes there. Where a defective Execution of a Power to charge Lands supplied against the Heir in Tail under a vo-

luntary Settlement in Favour of younger Children. 1 Ch. c. 263, 264. (b) But if it had been in Consideration of Money, it was admitted, it had been otherwise; for a *Volunteer hath not equal Equity with a Purchaser*; and all voluntary Conveyances are *prima facie* to be look'd upon as fraudulent against a Purchaser, 1 Ch. c. 100. *S. P.* 1 Ch. Rep. 146. 2 Ch. Rep. 74. in all which Cases, no Notice is taken whether the Purchaser had Notice of the voluntary Deed or not. Whereby it seems, that Notice in a Purchaser is not material against a Volunteer; though *Vide* 1 Ch. c. 264. that a defective Execution of a Power in Favour of younger Children, shall be made good against a Purchaser with Notice. (c) A voluntary Settlement shall bind the Party himself, for if you would relieve in this Case, you must consequently establish this Proposition, *viz. That a Man can make no voluntary Disposition of his Estate, but by his Will only, which would be absurd.* *Vern.* 100; and though a voluntary Deed is set aside against a Purchaser or Creditor, yet it shall stand good against the Party himself. *Vide* 1 Ch. Rep. 146. 1 Ch. c. 59.

(a) But if there be an Agreement precedent to the Marriage, or a Portion paid, then the Wife is a Purchaser, (*Vide ant. c. 15. the Notes there*) with whom a Volunteer has not equal Equity. As where the Husband in the Life-time of his first Wife, many Years before her Death, settled the Lands to the Use of himself for Life,

settled it upon his (a) Wife and (b) Children, there being no Fraud or Trust in the Case, the Surrender prevailed. *Vern. 365.* So where a Man voluntarily settled his Estate on his Infant Heir in Tail, and two Days afterwards made his Will, and devised the same Estate among other Things, to his Infant Heir in Tail, but subject to the Payment of his Debts, in case his personal Estate should not be sufficient to pay his Debts; as also of a Legacy of 250*l.* The personal Estate proving deficient, to pay both Debts and the Legacy; the Bill was to have the Debts paid out of the Land, that so the Legacy might be paid out of the personal Estate; but the Bill was dismissed, *Vern. 464. S. P. 2 Ch. Rep. 265.* that under such a Devise a (c) Bond-Creditor shall not prevail

Remainder to his first and other Sons in Tail; the Wife died without Issue, and upon his second Marriage in Consideration of a Portion paid, he agreed to settle Part of the Lands as a Jointure on his Wife; and having Issue the Defendant, died; the Bill was brought by the Wife to have the Jointure settled, and to set aside the Settlement as fraudulent against her; the Court, without sending it to a Trial at Law whether the Deed was fraudulent, declared that she was a Purchaser, and so decreed the Settlement fraudulent against her. *1 Ch. c. 100.* So where Tenant for Life having Power to settle a Jointure, covenanted before Marriage, in Consideration of a Portion, to settle a Jointure according to his Power; but died before Execution; Equity supplied it against the Remainder Man, who was a Volunteer. *Vide Max. 13. c. 3. and the Notes there.* And Lord *Coventry's* Case reported at large at the End of this Book. (b) Which shews, that the Heir of the Grantor of a voluntary Settlement, has no more Equity than the Grantor himself. *Vide ant. c. 15. the Notes there;* but if the Issue be Purchasers, there seems the same Reason to give them a greater Equity than a Volunteer, as well as to a Jointress. *Vide Vern. 440.* where said *per Cur.* that a Jointress and the Issue are equally Purchasers, and that they shall equally bear the Burthen of a prior Incumbrance; though *Vide the Case of Holford and Holford.* The Father made a voluntary Settlement on himself for Life, Remainder to the Heirs Male of his Body, Remainder to his Brother the Defendant in Fee; ten Years after in Consideration of a great Portion, he agreed to settle the Lands upon himself and his Wife, and their Issue, which Issue the Plaintiff (a Daughter) is; but though he lived some Years after, did not execute any Conveyance. A Trial was directed, whether the Deed by which the Defendant claimed, was fraudulent; and the Defendant to admit the Plaintiff a Purchaser; it was found against the Plaintiff; a new Trial was pray'd, and that the Defendant might admit the Plaintiff had a Conveyance, (though not such a one as to bar the Estate-tail, but a Conveyance by Way of Lease and Release) for as it stood upon the Articles, the Defendant's Conveyance could not be taken to be fraudulent against the Articles, nothing in Law passing thereby, and yet it would be fraudulent against a Conveyance; but the Court denied it, and so dismissed the Bill; though in the Arguing it was admitted, that every voluntary Conveyance, is *prima facie*, fraudulent against a Conveyance for a Consideration. *1 Ch. c. 216.* (c) But a Creditor by a Judgment, though subsequent, shall prevail against a Volunteer. *2 Ch. Rep. 265.* So of a subsequent Mortgagee; the Deed being upon a Trial found fraudulent against him. *1 Ch. c. 59.* So the Want of a Surrender to a Mortgagee supplied against the Devisee. *1 Ch. c. 170.* Though *Vide the Case of Jenkins and Kemis,* where Lands were settled in Consideration of a Marriage, and Portion paid; on the Father of the intended Husband for Life, Remainder to the Husband for Life, Remainder to the first and other Sons of the Marriage, Remainder to the Heirs of the Body of the Husband, with a Power for the Father by Deed or Will, to charge the Lands with 2000*l.* the Father and the Husband joined on a Mortgage of the Estate to the Plaintiff's Testator, with Covenant for further Assurance; the Wife died, and the Husband had Issue the Defendant by a second Wife, whose Title is by Virtue of the Remainder to the Heirs of the Body of the Husband; the Plaintiff insisted, that the Mortgage, though a Conveyance, ought to be taken

prevail against a Volunteer. So where the Testator, being indebted by Bond devised a Legacy of 500*l.* and also devised his real Estate to J. S. whom he made Executor; the Executor paid the Debts out of the personal Estate, so that nothing was left to pay the Legacy; the Legatee brought his Bill to have the real Estate (a) charged with the Legacy; but was dismissed; for it was as much the Intention of the Testator, that the Devisee should have the Lands, as the Legatee his Legacy. 1 *Salk.* 416.

taken as an Execution of the Power against the Defendant, who is a Volunteer, not being the Issue of the Wife, and so not within the Consideration of the Settlement, yet the Court was of Opinion, that

the Plaintiff could not be relieved in Equity. 1 *Ch. c.* 103. *S. C.* 1 *Ch. Rep.* 275. *Max.* 3. c. 5.

(a) *Vide*

(17.) J. S. was indebted to the present Plaintiff by Bond, and being sued at Law, brought a Bill in Chancery to be relieved; whereupon an Injunction was awarded, upon giving Security to abide the Order on hearing; the present Defendant was bound as such Security in a Recognisance, which was penn'd, to pay what should be reported due by N. H. a Master named in the Defeazance or Condition. But the Master died before any Report made, and so also did the other Obligor, who died worth nothing; by the strict penning of the Defeasance, the Recognisance was not enforceable at Law, because no Report was made by the Master; the Question was; if the Surety, who was not liable in Law, should be liable in Equity. It was insisted for the Plaintiff, that he had good Remedy for a just Debt, and justly proceeded to recover it, but the Court stay'd his Suit, and takes ill Security; and the Debt lost thereby; and therefore the Court is bound to do the Plaintiff right. And the Intent of the Court was, that the Debt, if due, should be secured; and the Intent was not with Reference to this or that Master's Report; for, suppose, the Court had, during the Life of the Parties, transferred the Reference to another Master, and he had made a Report, that should have

(a) It was so decreed, in the Case of *Underwood and Stoney*. 1 Ch. c. 77. that if A. lends Money to B. and thereupon B. and C. become bound in an Obligation to A. If A. loses this Bond, yet he may have Remedy in Equity against C. the Surety; tho' it was said, he was not bound in Law, but in Respect of the Lien of the Bond.

have bound; and in Case of a (a) Bond lost, this Court hath made a Surety to pay it; yet the Lord Chancellor *contra*; for the Party is but a Surety, not bound by Law. 1 Ch. c. 22. So where upon Administration granted during the Minority of the Plaintiff, who was Executor and residuary Legatee, the Defendants became bound as Sureties in the Spiritual Court, in the usual Bond: The Bill was against the Administrator for an Account of the Testator's personal Estate; and as to the Defendants the Sureties, it was suggested, that by *Fraud and Covin* they had got up their Bond, and had procured insufficient Security to be accepted by the *Prærogative* Court in the Room thereof. The Court upon the first Opening declared, they would not charge the Sureties, further than they were answerable by Law, and dismissed the Bill as to that Part. *Vern.* 196.

And the Difference seems to be, for that in this latter Case, the Money was lent upon the Credit of the Surety, and therefore since the Surety was the Cause of the Loss, he has not equal Equity with the Oblige; but in the other Case the Money was lent before, and would have been lost, if he had not been Surety, and therefore he being an innocent Person, and no Way conducing to the Loss, hath equal Equity with the Oblige. In the Debate of the Case of *Underwood and Stoney*, it was said, that if a Grantee in a voluntary Deed, or Oblige in a voluntary Bond, lose the Deed or Bond, they should have Remedy against the Grantor or Obligor in Equity; but a *Quære* is made by the Reporter; for surely the Obligor has equal Equity with his own Volunteer.

(b) For the Lands being devised to the Executor, are legal Assets; and all Creditors having equal Equity, there is no Reason to take the Advantage of the Law from one in Favour of another. But if they had been devised to Trustees, then the Assets would be meerly equitable, and all Creditors having equal Equity, and no Advantage at Law, one more than another, would be paid in Proportion. *Vide Max.* 3. c. 11.

(18.) If Lands are devised to the (b) Executor in Trust for the Payment of Debts, all Debts shall be paid in a Court of Equity; according to their Precedency or Superiority at Law. *Vern.* 65. So if they are devised to the Executor to pay Mortgages in the first Place, and then Legacies; yet all other Debts shall be paid before the Legacies. *Vern.* 69. So where a Man possessed of a Term for Years, mortgaged it, and then became indebted, first by Statute, and then by Judgment, and died; the Equity of Redemption vesting in the Executor; it was decreed the Judgment should be first satisfied out of it. *Vern.* 293.

sets would be meerly equitable, and all Creditors having equal Equity, and no Advantage at Law, one more than another, would be paid in Proportion. *Vide Max.* 3. c. 11.

A
T A B L E
O F T H E

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F I N I S.

T H E
A R G U M E N T S
O F T H E

Lord Chancellor *Macclesfield*, the Master of the *Rolls*, Mr. Baron *Price*, and Mr. Baron *Gilbert*, in the Case of the Earl of *Coventry*, concerning the *defective Execution of Powers*.

Die Sabbati 16^o Maii 1724, Countess Dowager of *Coventry*, against the Earl of *Coventry* & al.

The C A S E:

THOMAS Earl of *Coventry* being seised in Fee of several Manors, &c. some in Possession, and others in Reversion expectant upon Lives, by Will dated *March 24, 1698*, devised Part thereof to his elder Son *Thomas* for his Life, Remainder to his first and other Sons in Tail Male; and other Part to his younger Son *Gilbert* for his Life, Remainder to his first and other Sons in Tail Male, with cross Remainders; Remainder of the Whole to his Uncle *Francis Coventry* for his Life, with like Remainders to his Issue Male; Remainder to his Cousin *William Coventry* (the present Earl, and one of the Defendants) for Life, with like Remainders to his Issue Male; Remainder to *Henry Coventry* (another Defendant) with like Remainder to his Issue Male, with other Remainders over. In which Will there is this Proviso,

Provided also and it is my Will, that notwithstanding any Thing in this my Will contained, it shall and may be law-

(* *)
(* *)

ful

The Earl of Coventry's Case.

ful to and for any Person and Persons who by Force or Virtue of this my Will, or any Codicil or Codicils to be added to this my Will, shall at any Time or Times hereafter be seised of any of my Manors or Lordships, Messuages, Lands or Tenements, by any Writing or Writings indented under his Hand and Seal, or Hands and Seals, to limit and appoint any such Manors and Lordships, (except, &c.) and any of the said Lands, Tenements, Tithes and Hereditaments, not exceeding in the Whole 500 l. per Ann. to any Wife or Wives which such Person or Persons shall happen to marry, for her or their respective Life or Lives, for her or their Jointure or Jointures; so as such Person or Persons shall have with such Wife or Wives, upon such Marriage, a Portion equivalent for such a Jointure.

Thomas the elder Son died without Issue Male.

Gilbert the younger Son died without Issue Male, but left a Daughter by a former Wife, the Wife of Sir William Carew, both Defendants.

Francis Coventry died without Issue Male; whereby the whole Estate vested in William Coventry, now Earl of Coventry.

But Earl Gilbert being seised of the Estate by Virtue of the Will, upon a Treaty of Marriage with the Plaintiff (his second Wife) and Sir Strensham Masters her Father, by Articles of Agreement dated June 24, 1715, made between Earl Gilbert of the first Part, Sir Strensham Masters, and the Plaintiff Anne his only Daughter of the second Part, in Consideration of the intended Marriage, and of 10000 l. which was actually paid by Sir Strensham Masters as the Plaintiff's Marriage-Portion, Earl Gilbert covenanted with Sir Strensham Masters, his Heirs, &c.

That he, or his Heirs would after the Marriage, at his own Costs and Charges, according to the Power given him by his Father's Will, or otherwise by good Conveyances, settle Manors, Messuages, Lands, &c. of 500 l. per Ann. upon the Plaintiff for her Jointure, to commence in Possession immediately after his Death, if she survived.

The Earl of Coventry's Case.

Soon after the Marriage, Earl *Gilbert* going down to his Country-Seat, delivered the Articles to his Steward and his Court-keeper, and directed them to look over the Rentals, and find out a fit Part of the Estate to settle according to the Articles. Great Difficulty there was, to find out a Part of it, which was clear of all Incumbrances. At length the Manor of *Woolvey* was found to be the only clear Part of the Estate, but that was not above 400 *l. per Ann.* During the Consultation, where to find another clear Part of the Estate of the Value of 100 *l. per Ann.* the old Steward was removed, and another was put in, who was intirely ignorant of the Estate, which occasioned a farther Delay: At length an Estate called *Woolston* was pitched upon, but that being in Mortgage, and the Earl not having the Counterpart of the Mortgage, whereby to know what Part of that Estate was not included in the Mortgage, and the Mortgagee refusing for some Time to take his Money, or to shew his Mortgage Deed, it gave the Earl great Uneasiness. At length the Mortgagee took his Money, and the Earl an Assignment of the Mortgage, and thereupon Part of that Estate, not included in the Mortgage, was pitched upon; and a Particular thereof being made, the Earl ordered Instructions to be drawn for Counsel, which he intended to carry himself very suddenly to *London*; but was prevented by an Account of the Raging of the Small Pox there.

Some Time after Sir *Strensham Masters* came to visit the Earl at his Country-Seat, and being very dissatisfied that the Settlement was not made, the Earl delivered him the Instructions to carry to *London* to have a Settlement drawn; but Sir *Strensham's* Memory failing him, he entirely forgot that such Instructions were delivered to him; and upon the Earl's sending to him to know what he had done upon the Instructions, and such an Answer being returned, that no such Instructions were delivered to him, the Earl shewed great Uneasiness and Anger at it.

Then new Instructions were drawn, and sent to *London* by the Earl's Chaplain, who returned with the Ad-

(A)

vice

The Earl of Coventry's Case.

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The Earl being suddenly taken ill with the Gout, was advised by his Physicians to go to the *Bath*; and after his Return, being still ill of the Gout, his Physicians directed, that he should not be troubled with any Manner of Business whatsoever; but about a Week before he died being then in good Health, though his Gout upon him, the Settlement was ordered to be brought up to be executed; but a neighbouring Gentleman came to make him an untimely Visit, at which the Earl shewed great Uneasiness, because it prevented the Execution of the Deeds for that Time.

About four Days before his Death, his Physician giving him great Assurances of his Recovery, he sent his Steward about forty Miles distant about some Business, who carried the Key of his Office along with him, where the Settlement was locked up. Two Days after, the Earl being taken suddenly with the Gout in his Stomach, called for the Settlement to be executed, but not being to be had, a Messenger was immediately dispatched to the Steward to come back with the Key; but his Lordship died in two Days, before the Steward's Return.

But the Earl a little before his Death made his Will, and thereby gave the Plaintiff a Legacy of 3000*l.* *besides what is settled upon her by our Marriage-Articles*; and made Lady *Carew* his only Daughter and Heir, Executrix of the Will.

The Bill was brought against the present Earl of *Coventry*, and *Thomas* and *Henry Coventry*, who were all the Remainder-Men behind him; and against Sir *William Carew* and his Lady, being Heir and Executrix of Earl *Gilbert*; and thereby the Plaintiff insisted, that the Articles alone ought in a Court of Equity to be construed as an Execution of the *Power*; and that the Deeds engrossed were a good Appointment of the particular Lands; but
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in

The Earl of Coventry's Case.

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in Case the Articles and Deeds engrossed should prove defective, or not amount to a sufficient Appointment thereof, then in such Case by Virtue of the Covenant in the Articles, the Heir at Law of Earl *Gilbert* ought to set out other Lands to her for her Jointure, of the like yearly Value; or ought out of the real or personal Assets to make her Satisfaction.

Mr. Baron *Gilbert*. The Questions, which, as I apprehend, will be necessary for the Decision of this Case, at least such as I shall break it into, will be these two.

First, Whether any Acts done by Earl *Gilbert* will be binding and a real *Lien* upon the Defendant, who is in Remainder?

Secondly, If that should be so, whether he has any Right to be relieved against the Heir or Executor of Earl *Gilbert*, touching his real or personal Estate? These two Questions being first settled, will take in that, which will be the Resolution, touching the Decree to be made in this Cause.

Now as to the first of these Questions; I am of Opinion that those Acts done by Earl *Gilbert*, will be a real *Lien* upon the noble Lord in Remainder; and for that Purpose would gladly consider these *Powers* in general; and why particularly in this Case, the *Power* ought to affect the Remainder-Man.

These *Powers*, when they first came over into the Common Law, upon the Statute of 27 H. 8. for *transferring Uses in Possession*, were by the joint Resolutions of the Common Law, taken too strictly in Point of Circumstances. As they went to defeat that very Estate which was raised by the Covenant, and actually settled by the Covenantor who had the Inheritance, they were looked upon as odious, and what merited no Favour whatsoever: And therefore it was held necessary, that every Circumstance that was appointed in the Execution of them should be complied with, before they could divest an old Estate, or create a new one.

This, I say, was at Common Law; but as it was contrary to natural Justice, so this Court hath always interposed,

Powers
taken too
strictly at
Common
Law.

interposed, and supplied such Defects where-ever there appeared to be a valuable Consideration, as in Cases of Marriage, Jointures, and other like Settlements: And of late the Courts of Law have considered them in a more favourable Light than heretofore; for this *Power* may be look'd upon more properly, as Part of the old Dominion, which the Owner of the Inheritance reserved to himself upon the Creation of the Estate for Life, to which he annexed it; and I think, it would be contrary both to natural Reason and the Intention of the Parties, that any other Construction should prevail. It is surely in every Man's Power to limit and dispose of his own Estate upon such Terms as he pleases.

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Articles
for a Sale
by Te-
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Tail shall
not bind
his Issue.

The next Question will be upon the Articles, whether they do bind this Estate, so as to be a real Charge and *Lien* upon the Remainder. As to that, I think, they are. Where there is a Price paid, and there comes a subsequent Marriage, which are the Consideration of Marriage-Articles, I look upon the Jointress to be, *eo instanti* that the Price is paid, and the Articles executed, a Purchaser for a valuable Consideration. In all Cases, where an Agreement is entered into in Contemplation of a valuable Consideration, when *that* is performed, it is but Justice and Conscience, that the Purchaser should have an immediate Right and Ownership, in what he hath so purchased: And therefore a Court of Equity, before the Execution of any legal Conveyance, looks upon the Party to be in immediate Possession of such Estate, and to have a Power of devising and giving it away; nor have I heard of any Case, which in any Degree impeaches this Doctrine, but the single Case of *Powel and Powel*, where a Tenant in Tail had articted to levy a Fine and suffer a Recovery, but afterwards refusing, the Court of Chancery decreed, that his Heir should not be held to a specifick Performance; but the Reason of that Resolution will appear to turn upon another Foundation; it was because the Heir in Tail came in under the Statute *de donis*, and is in by Virtue of that Statute singly; and not any Way deriving from the Ancestor who contracted: But if it

The Earl of Coventry's Case.

5

had been an Entail in Equity, this Court would have forced the Heir to comply with any Bargain made by his Ancestor.

Articles
for a Sale
by Te-
nant in
Tail in
his Issue.

Equity shall bind

There have been other Cases mentioned to the same Purpose, but I think they all fall under this general Reason, that the Persons, who came into this Court for Relief, were Volunteers; and there was no Bargain made, no Price paid, nor the Party any way damaged; and therefore he could not hope to recover any Damages at Law, for the Breach of such Covenant.

Volun-
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Heir.

And as to the other Set of Cases, that this is not a *legal Lien* upon the Estate, I cannot see what Weight that can have in a Court of Equity, since that is the very Reason, that obliges the Party to come here for Relief.

There is one Case, I think has not been mentioned; that of *Smith* and *Wooley*, which was a Power to limit and appoint Lands by Will, so as the same was signed and sealed; although it was not signed and sealed, yet a Paper which purported to be a Will, and was really such before the Statute of Frauds and Perjuries, amounted to a good Declaration of such Power: But I Question, whether it may be so since that Statute, unless there had been something signed and sealed by the Party; and therefore I cannot lay any Stress upon the Draught of the Will, which was prepared in this Case, so as to make the same amount to an actual Execution of the Power: But my present Opinion is, upon all the Circumstances, that this is such a Defect, as is proper for the Relief of this Court.

Power to
limit
Lands by
Will, *sign-
ed and seal-
ed*, whe-
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must be
signed
and seal-
ed since
the Sta-
tute of
*Fraud and
Perjuries.*

As to the *second* Question, whether the Plaintiff has any Right to be relieved against the Heir or Executor of *Earl Gilbert*, touching his real or personal Estate? The Covenant is, as I have observed, that the Earl or his Heirs, or his Executors should settle Lands in Pursuance of that Power, or otherwise. It has been said at the Bar, that the Words, or otherwise, at the End of the Covenant, should be look'd upon as meer *technical* Words in the Draught; and that they should have no Operation to

(B)

charge

Words
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charge the real or personal Estate of the Earl. That, in my Opinion, is Cramping the Articles too much: For to reject any Words out of Wills or Conveyances, it must appear exceeding plain, that nothing could be meant or intended by them. This hath been a sacred Rule in all Expositions, and what, if once departed from, may introduce the greatest Inconveniences, and by Degrees cancel and defeat the End of all written Agreements whatsoever.

My Apprehension is, that the Words, *or otherwise*, are auxiliary to the real *Lien* upon the Estate by the former Words. That I take to be the natural and general Construction, as I look upon it, that the Marriage was had, and the Portion paid in Contemplation of the *Power*; and if the Earl had not had such a *Power*, the Marriage had never taken Effect; and therefore the Dominion he had over the Estate by Virtue of the *Power*, must be reckoned to be the Consideration of the Marriage, and the original Foundation of this Jointure; but the Words, *or otherwise*, make the Obligation he was under of providing for this Lady still stronger than it was before. The *Power* was a *Lien* only upon the Heir, and he alone in Execution of the *Power* could have been obliged to make good the Jointure: But as the Estate was loaded with many Incumbrances, which must have been previously satisfied and discharged before such Jointure could take Effect, it was but a prudent Provision, to bring the Assets, which were to come to the Hands of the Executor, in Aid of the Provision he intended for his Lady, and to make the Executor auxiliary, in case the Land proved defective.

Debts by
Mort-
gage to
be paid
out of the
personal
Estate.

This Exposition is grounded upon a Principal of Equity, that whensoever there is a Debt charging a real Estate, the Executor should assist the Heir in paying it, because the Assets are the proper and natural Fund for satisfying such a Debt, since if the Testator himself had in his Life-time discharged it, the Assets would be by so much the less considerable; and that as Mortgages, which are due to the deceased, go in Increase of the personal

The Earl of Coventry's Case.

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sonal Estate, so it seems to be just, that the same Fund should be applied towards satisfying them: And therefore it is, that Courts of Equity do every Day settle Proportions and Contributions in these Cases between Heirs and Executors; but here it cannot be presumed, that Parties had it in their Intention to subject any Thing but the *Power*; and therefore to bring in the personal Estate, would be creating an original *Power*, that is nowhere taken Notice of, nor does it appear to have been intended in the whole Negotiation. This, I say, would be substituting a new *Power* instead of an old one.

Mr. Baron Price. This *Power*, I take to be a *Power* coupled with a Trust, which runs through the whole Estate; so that any of the Remainder-Men, who shall at any Time take an Estate under this Will, is to be considered but as a Trustee, in respect of any Jointress, who shall take in Pursuance of the *Power* reserved by the Will. Now if notwithstanding any Defect in the Non-observance of Circumstances, the legal Estate should not be convey'd in Virtue of this *Power*; yet as she paid a valuable Consideration, for what was intended to be passed under this *Power*; there is the same Foundation for considering her as a *Cestuy que Trust*, as the other a Trustee: And what can be a more proper Case for this Court to decree Relief in, than when such a Person demands a Conveyance of the legal Estate, and an Account of the Profits?

There is a wide Difference between these kind of *Powers*, and *Powers of Revocation*. The latter being generally annexed to voluntary Settlements, and always tending to overthrow and defeat Estates, have therefore been looked upon as odious both in Law and Equity: But I have never known it otherwise, but that Powers like this in Question, have always had a liberal Sense and Construction put upon them. It is the Honour and Glory of a Court of Equity, to reduce all Acts into Execution as near as possible to the Intention of the Parties: And hence it is, that we see constant Application made to

such

Difference between Powers of Revocation, and Powers of Appointment of Estates. Equity reduces incomplete Agreements into Execution, where Damages to be recovered at Law.

such Courts, for a specifick Performance of Articles and other incompleat Agreements, which the Parties at Law could have no Compensation for but in Damages. They go always upon this, that where the Substance of the Agreement is performed, they will supply any Defect in the Form. So that this would amount to a good Execution of the Power, had there been no other Transaction, but that of the Articles only; but this Case goes a great deal further; for after the Marriage, Earl *Gilbert* declares his Intention in the strongest and most effectual Manner: He orders a Deed to be drawn, and a Draught was accordingly prepared, where certain Lands were actually set out, and appointed to be vested in Trustees for the Use of the Plaintiff; and the Conveyance had been executed, if Death, which is the Act of God, had not prevented it.

But it may be further observed, that although the Designation and Appointment of these Lands, was to come from Earl *Gilbert*, yet the Estate was to move in Reality from another: For as according to the Resolution in Sir *Edward Clere's Case*, in the 6th Report, if a Feoffment is made to the Use of a Will, the Estate in such Case is derived not from the Will, but the Feoffment; so the Articles which interposed in this Case, are only directory of the Will, which first created the Power.

But it is objected, that the particular Lands are not specified in the Articles; to which it may be answered, that *certum est, quod certum reddi potest*; for there is a Relation to such Estate, as is comprised in the Will; and he cannot settle any, but what is Part of the Estate so referred to.

There have been other Objections made in this Case, and first, that he covenants for himself, his Heirs, Executors and Administrators, that he would settle, or would *procure to be settled* Lands of 500 *l. per Ann.* pursuant to the Power reserved to him, or otherwise; it is said, that this is not a perfect Declaration or Execution of such Power, because the Words, or otherwise, leave it loose, and

The Earl of Coventry's Case.

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and he was thereby at Liberty to have settled another Estate for the Plaintiff's Jointure. I don't know that in common Understanding, any great Stress is to be laid upon the Words, (*or otherwise*) and that they are of any great Weight, being generally inserted in all Covenants by Conveyancers. But granting them the strongest Import and Signification, I think they have this obvious and natural Meaning, that Earl Gilbert might be at Liberty to make a Provision for his Lady out of another Fund, or that if the Estate, to which the Power extended, should prove short or defective, he should be obliged to assign another Fund for supplying such Deficiency.

So that without descending minutely into the several Authorities which have been cited, I take it to be manifest from the Reason and natural Justice of this Case, that it is incumbent upon a Court of Equity to execute the Intention of the Parties; to supply the Defect of any Circumstance in the Execution of this Marriage-Agreement, and to let the Lady enjoy the Benefit of that Provision which her Husband intended for her, and her Friends, who carried on the Treaty of Marriage, had in their View: And though it has been said, that this is the Case of an Heir at Law, who is to support the Honour and Dignity of a Noble Family; yet it ought not to be forgot, that it is also the Case of a Jointress, who has been at least equally the Favorite of a Court of Equity.

Master of the Rolls. This Case, in my Apprehension, may be reduced to one Question only, *viz.* Whether the Plaintiff, by Virtue of her Marriage-Articles, hath a specifick *Lien* upon the Lands in Question? Although in the Course of this Argument, a second Question has been made, *viz.* Whether she ought not to take her Remedy against the real or personal Estate of her deceased Lord? But the Determination of the first Question will, I take it, put an End to the Second; for if she hath, by Virtue of these Articles, a specifick *Lien* upon this Estate, I don't see that she is bound, in Favour of the Remainder-Man, to depart from it, and take her Remedy either against

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the real or personal Estate: As she need not do it, so, I conceive, she is not bound to do it; but on the contrary she having that which was intended for her, made good to her, she must abide by it.

Marriage
a suffici-
ent Consi-
deration
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the *Feme*
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chaser.

I shall in the first Place consider, under what Qualifications the Plaintiff stands before the Court. She is a Purchaser for a valuable Consideration, and unprovided for, unless this Court shall think fit to relieve her; at least not provided for in such Manner, as was agreed to, between her Husband and her Father, who treated this Marriage on her Behalf: And in both these Circumstances, as well in Regard that she is a Purchaser, as that otherwise she will be unprovided for, she is intitled to have the Benefit of these Articles. When I say she is a Purchaser, I must take Notice, that she is so, not only in Respect of the Marriage, which alone would be a sufficient and meritorious Consideration, but likewise in Regard of a very great Fortune, which she brought into the Family. It has been said indeed, that the Noble Earl the Defendant stands in very favourable Circumstances, as he is the Representative of the Family; and therefore this Charge ought more properly to be laid on the personal Estate, the better to enable him to support the Honour of it; but if there is any Weight in this, it ought to be considered, that the Plaintiff's matrimonial Right of participating in the Honour, gives her no less a Claim to the Indulgence of the Court.

I think it proper in the next Place to take Notice, that altho' the Plaintiff is thus qualified, she has nevertheless brought her Bill, not only against the present Earl of *Coventry*, but also against the Executrix of the late Earl: In which, I think, she was very properly advised, least if the Court should be of Opinion, that she was not relievable against the present Earl, they might do her Justice against the other Defendant the Executrix of the late Earl; besides it was proper, to make the Executrix a Party, because of the Plaintiff's Demand

The Earl of Coventry's Case.

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mand of her Legacy of 3000 *l.* which she hath against the personal Estate.

Here I think it proper to mention an Objection, *viz.* That as the present Earl is but Tenant for Life, the Plaintiff, if she would have bound the whole Inheritance, ought to have made his eldest Son, who has the next Remainder in Tail, Party to a Cause, where a Charge is set up, which may affect the Estate after the present Earl's Death: But, I think, the Defendant was well advised, not to take Notice of this, since if the Plaintiff would put off the Cause, and in order to make her Decree more conclusive, would make the Earl's eldest Son a Party, it would only create more Expence to the Parties: But thus far, the not having brought the Remainder-Man before the Court, will influence the Relief, which the Plaintiff can have at this Time, that it will not be so extensive, as if he had been made a Party; for then she might have had a Decree to hold and enjoy during her Life, and have bound the whole Inheritance, whereas now she can only have a Decree to bind the Estate of the Tenant for Life, and of the subsequent Remainder-Men, who are before the Court.

Having premised thus much, I cannot but observe, that *Powers* arising out of *Uses*, did originally belong to Courts of Equity only. Before any of the Statutes relating to *Uses*, Courts of Law could neither judge of the Consideration of *Uses*, nor of any Conveyance to *Uses*; nor consequently had any Jurisdiction concerning *Powers*, which arose out of them; but they appertained solely in Point of Jurisdiction to Courts of Equity: Now indeed those Statutes, and particularly that of the 27 *H.* 8. hath by transferring *Uses* into Possession, incorporated them together; they are become legal Estates, and belong to the Courts of Law to judge of: But still were this a Conveyance to *Uses* executed, or a Common Law Conveyance, the Consideration of any equitable Interest in the Estate conveyed, belongs to Courts of Equity by
Virtue

Uses and *Powers* arising out of them belonged to Courts of Equity only before the Statute of *Uses*.

The Consideration of any equitable Interest in a Conveyance to *Uses*.

belongs to Courts of Equity notwithstanding the Statute of *Uses*.

Virtue of that original Power which they had before the Making of any of those Statutes, and which is not taken away by any of them; and consequently, I think, the present Case comes before the Court as properly, and in the same Light, as it would have done before the Statute of *Uses*.

Before the Statute of *Uses*, *Cestuy que Use* in Fee had a Power to make an Appointment of the *Use*, or of any Part of it; and this would have enured by Way of Direction to the Trustee to stand seised to such *Use*, or to convey; and the Judgment and Construction of such Appointment belonged to a Court of Equity, which alone could compel the Trustee to convey; and since the Statute, if *Cestuy que Use* for Life, with a *Power*, covenants for a valuable Consideration to execute his *Power*, and in the Execution it proves defective, this Court aids the Execution of it, and makes it effectual. Nay further, if he doth not execute his *Power* at all, this Court, I conceive, ought to decree an Execution of that Covenant, as it would of any other Covenant for a Consideration, and compel him to execute his *Power*; for as the Justice of the Court makes good a defective Execution against the Remainder-Man, so if the Tenant for Life dies before the Execution, I conceive there is the same Justice due to the Purchaser against the Remainder-Man, after his Remainder takes Place, as there was before, for by the Covenant the Purchaser has a *Lien* upon the Estate, into whose Hands soever it comes.

Tenant
for Life
with a
Power,
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nants for
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supply a
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ecution against the Remainder-Man.

The Aiding an imperfect Conveyance, and the carrying into Execution a Covenant to convey, stand upon the same Foot in all Respects. If Tenant in Fee makes an imperfect Conveyance for a valuable Consideration, this Court will supply that Defect, and decree an effectual Conveyance to be made. So in like Manner will this Court decree a Conveyance, if he covenants for a valuable

valuable Consideration to convey. To come nearer to the present Case: A Man seised in Fee of Lands of 1000 *l.* *per Ann.* covenants to settle Part of them worth 500 *l.* *per Ann.* though the Lands be not specified, there can be no Doubt but such Covenant would be carried into Execution by this Court.

Tenant in Fee covenants to settle 500 *l.* *per Ann.* Part of 1000 *l.* *per Ann.* this Court will decree a

specifick Execution.

As to the Case, that has been mentioned, of a Tenant in Tail, who, without levying a Fine or suffering a Recovery, makes a Conveyance to a Purchaser for a valuable Consideration; I agree, the Court would not decree it to be made good against the Issue in Tail, or the Remainder-Man, for the Reason that hath been given by *Mr. Baron Gilbert*: And I would add this further Observation, that a Common Recovery being held to be absolutely necessary, to take the Estate-Tail out of the Statute *de donis*, then only it is, that the Conveyance is substantiated: Nothing can deliver the Estate out of that Statute, but such a particular Form of Conveyance, and therefore if the Party hath not used it, it remains still within the Restraint of that Statute. Indeed I don't know any Case whatsoever, wherein the Form of Conveyancing is so essential, as in the Case of Tenant in Tail; for a Common Recovery must be had, to let him into the absolute Dominion of the Estate; unless it be of an Estate-Tail without any Remainder; and then a Fine by the particular Provision of the Statute of 4 *H.* 7. is sufficient.

Tenant in Tail conveys without Fine or Recovery; this shall not in Equity bind the Issue, or the Remainder-Man.

To come to the present Case: In order to determine it, it is necessary to consider the Articles upon the Plaintiff's Marriage, as they are relative to the Will of *Earl Thomas*: And here I must say, I differ from the Counsel as well of the one Side as the other, in some Particulars. I think, that *Earl Gilbert* had his Election to make this Conveyance either by Way of Appointment according to the *Power*, or to convey or procure to be

(D)

conveyed

conveyed an Estate in Fee-simple. Notwithstanding what the Plaintiff's Counsel have objected, that the Word, *Heirs*, ought to be rejected, as inconsistent with the Provision, which was to take Effect immediately after the Death of Earl *Gilbert*, which it is impossible it should do (*say they*) in Case such Provision was to be made after his Death by his Heir; yet here are Words, whereby he hath a Liberty to execute those Articles, by appointing the *Use* pursuant to the *Power*, or by conveying Lands in Fee-simple; (though I don't think he would deliberate long upon that Point, whether he should charge Lands, which were already settled upon the Remainder-Man, or those which he had absolutely in his Power) but that which shews he was to have an Election is the Words, *or procure to be conveyed*, which must necessarily have Relation to Lands in Fee-simple only, because the *Power* of Appointment under the Will, being personal to the Earl himself, he could not transfer it to, or procure it to be executed by another.

Taking this Exposition then to be right, there is no Reason, that because Earl *Gilbert* thought fit to contract for Lands which were in his Power, and also for Lands which were not in his Power, that the Party with whom the Contract was made, should thereby be prejudiced as to the Lands which were in Earl *Gilbert's* Power: And the Question coming to be, whether within the View and Intention of the Parties, these Articles ought to be considered as a Charge upon the Lands, which he might charge by Virtue of the *Power* in the Will, I must be of Opinion, that they are a Charge upon that Estate, and that the Alternative was but auxiliary, and put in as a Provision, in Case of a Default of Sufficiency of the Estate comprised within the *Power*; and therefore that the present Lord cannot deliver himself from the Execution of that *Power*, which was certainly within the Intention of Earl *Gilbert* to have executed, and was as clearly within the Intention of Sir *Strensham Masters*, who must be thought to expect and depend upon a Provision

vision out of those Lands, which he knew the Earl had a Power to settle, rather than out of Lands, which it did not appear he had then purchased, nor was it certain he ever would: And accordingly Instructions for Counsel to draw a Settlement of Lands within the *Power* were delivered to Sir *Strensham Masters*, which is a sufficient Evidence of his Concurrence, if that were necessary: And I take it, that the Articles are a *Lien* upon the Estate, notwithstanding particular Lands are not mentioned, but only a general Covenant to settle Lands of the Value of 500 *l. per Ann.* for in the Case I just now put of a Covenant to convey; If a Man seised in Fee of Lands of 1000 *l. per Ann.* covenants to convey Part of those Lands of the Value of 500 *l. per Ann.* the Covenantee hath an equal Right to have 500 *l. per Ann.* of the 1000 *l. per Ann.* as much as if the Lands had been specified: *That* being certain, which may be reduced to a Certainty, and this Court having always exercised a Power of setting out Lands.

Now although I am of Opinion that the Plaintiff the Countess would have been entitled to Relief, had there been no other Transaction than that of the Articles and the Marriage; and it may not be necessary for me to say any Thing as to the particular Lands intended to be settled by Earl *Gilbert*, with great Advice, upon inspecting his Writings, and consulting his Agents; nor doth it seem to be of much Consequence to either Party, whether 500 *l. per Ann.* be set out by Commissioners appointed by this Court, or the Lands already specified be taken at that Value (for it is not suggested that those Lands do exceed 500 *l. per Ann.* but on the other Side the contrary hath been alledged, that they rather fall short, than exceed that Value, and this hath not been disputed by the Defendant's Counsel) I say notwithstanding all this; yet the Plaintiff's Counsel having laid a great Weight upon this Point of the Designation of the Lands by Earl *Gilbert*, I must say; That where a Man may do or forbear to do an Act, and resolves to do it, and makes
some

Whether preparatory Steps towards doing an Act, which a Man is bound to do, but is prevented by Death, shall be aided by a Court of Equity.

some Steps towards it, and is prevented by Death from carrying that Resolution into Execution, I cannot think *That* a Foundation for Relief in this Court. It is true, there has been a Difference taken between Acts a Man is bound in Conscience to do, and those he is under no Obligation to do: It is said, where he is bound in Conscience, there Death will not prevent the Effect of his Resolution; and the Case of *Smith* and *Ashton*, 1 *Ch. Cas.* 264. hath been cited for that Purpose; but when that Case comes to be considered, it doth not warrant that Doctrine: Tenant for Life, with *Power* to charge his Estate by Deed or Will with 500 *l.* by way of Provision for his younger Children, sent Instructions for the Draught of a Deed for that Purpose, but before the Conveyance was prepared, died. The Court did not think that Accident a sufficient Foundation for Relief, but having directed a Trial, whether those Notes were Part of his Will, it being found they were, the Court decreed accordingly for his Children: Now if the Court could at first have relieved in that Case, they had no need to direct that Issue.

This Case is cited by the two *Chief Justices* in Argument of the Case of *Bath* and *Mountague*, and is there taken stript of that Matter of the Notes found to be a Will, and represented in this Manner; That if a Man hath it in his Intention to execute a *Power* for the Benefit of his younger Children, and is surprised by Death, a Court of Equity ought to aid: But this not being an original Opinion of those very learned Persons, but relative to the Case cited, it can be carried no farther than that Case doth warrant: I don't say, but in the Case of a Provision for younger Children, some solemn Act done by the Parent, the Nature of which the Court will judge of; and though it be ineffectual, it may be reasonable that a Court of Equity should aid it; and these defective Executions of *Powers* are frequently aided; but where a Man is only preparing to do an Act, and he may or may not do it, it seems pretty difficult to make
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those preparatory Steps to amount to such an Execution of his Power, as this Court would make effectual.

Indeed no one can say in this Case, but that the late Earl was bound in Honour and Conscience to execute this Covenant; and it appears fully by the Proofs, that he thought himself under that Obligation: It appears that he had the greatest Anxiety upon him concerning it, and therefore it would have been an hard Case if the Plaintiff should lose her Jointure, had it gone only upon the Foot of *Accident*; but from what I have already observed, it may be absolutely rested upon the Articles, and therefore I think it altogether unnecessary to deliver any positive Opinion, how far independent of the *Lien* by the Articles, all that followed, would have amounted to such an Execution of the *Power*, as this Court would have made effectual: But upon the whole, I am clearly of Opinion, that the Complainant is entitled to be relieved.

Lord Chancellor. Many Cases having been cited, which were alledged to be parallel to the present one; I was desirous in a Question of so great Importance, that they might be first looked into, and that I should be afterwards assisted by my Lords the Judges, before I came myself to any Resolution upon it: And they have set this whole Matter in so very clear a Light, that as it gives me no Manner of Difficulty in giving my Judgment, so it would be vain to go about to repeat the many Reasons, that they have been pleased to ground there Opinions upon.

I shall however touch upon some few Particulars, and that very briefly; It will give a great Light to this Matter, to consider what was probably the Intention of the Noble Earl, who first created this Power. He is providing, that whilst the Estate should, as much as in him lay, attend and accompany the Honour, (which could be best effected by making every Person that was likely to succeed, Tenant for Life only,) it should, notwithstanding the Narrowness of such Estate, be in the Power of every

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such Person, to make an ample Provision by Way of Jointure for his Lady: And that Noble Lord, as he had the Honour of being first created Earl, might have well thought himself under the greater Obligation to the Crown, not only to provide for the Support of the Honour in the Male Line, but likewise for the Subsistence of every Lady, every such Remainder-Man should happen to intermarry with.

A Power, which the Person conveying reserves, is Part of the old Dominion.

But not only in Regard to this reasonable Intention of the Party who first created this *Power*, but also as the *Power* which a Tenant for Life reserves to himself over an Estate which he departs with, has been very properly called a *Dominion* which he has over it, and is Part of that antient Estate, which he had before such Settlement; I think the Opinion and Advice that has been offered to me is perfectly right; *viz.* that the Execution of this *Power* ought to have a liberal Construction, and therefore it is to me exceeding plain, that this Land is bound and affected by the Articles.

The only material Objection that I have heard mentioned, was by Way of Distinction between Cases, where there is another Remedy to which the Party may resort, and where there is none. It has been laboured indeed, that in this Case there is another Remedy; but I apprehend, that all that has been offered, amounts to no more, than that there might have been one. But whether there was, or was not; I take the principal Question here to be, whether, when the other Part of the Covenant so much insisted upon, is unperformed, nay unattempted to be performed, (for any Proof that has yet been offered) the Complainant shall be deprived of a Remedy, expressly granted and provided for her, and to which she is entitled, without injuring any third Person whatsoever. I cannot but look upon it, that if the Earl had any other Lands of which he was seised in Fee, Sir *Strensbam Masters* knew nothing of it; and if the Earl had no other Lands in Fee-simple, then the Covenant lays an absolute *Lien* upon this Land: But it is true, the disjunctive

Words left a Latitude to my Lord to have made another Settlement, which would have delivered the Estate from this *Lien*; but would it not be a most extraordinary Exposition of this Covenant, and what must tend entirely to defeat the Intention of the Lady and her Friends, that because his Lordship had a Liberty to settle other Lands, (if any he then had, or should purchase hereafter) therefore she should lose her *Lien* upon that Estate which was first bound and contracted for, when he hath made no other Settlement? That the principal Covenant should be tripped up and defeated by that which was only auxiliary?

As to the other Objection, that this is not to be considered an Execution of the Power, because no particular Lands have been specified; I do admit, it doth not amount to an Execution of such *Power* at Law; neither possibly would it, had he specified the particular Lands, in Case they had exceeded or fallen short of the Value the *Power* was restrained to; but though the Parcels are not ascertained, it cannot be contended, but that they may be in a Court of Equity; and therefore had the Case rested solely upon the Articles, it had been very proper for Relief.

But, I think, the several Steps that were after taken, have been sufficient to ascertain what those Particulars are; for all the Acts subsequent to the Articles were not voluntary, but proceeding after the greatest Deliberation, upon a Covenant which he was bound to perform: The deceased Earl, after examining his Papers, and enquiring into his Rentals, agrees and directs that these Lands should be conveyed over, and appropriated to the Use of this Lady. Before the Statute of *Frauds and Peajuries*, Signing and Sealing were thought so little essential, that even the Defect of any Writing at all hath been supplied; so that though the Statute of *H. 8.* enabled a Tenant in Fee to devise his Lands by Will in Writing, yet if such Person gave Directions to have his Will wrote, but died before it was done, yet it was well: But here are

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Tenant for Life with Power, covenants to execute his Power, but the particular Lands are not specified; yet it is good, and a Court of Equity will ascertain them.

Preparatory Steps towards doing an Act, which a Man is bound to perform, but is prevented by Death, a proper Subject for Relief in Equity.

not only Instructions sent, but a Draught actually prepared and engrossed after Counsel had been consulted with; and in this Writing, which was intended to be executed, are contained all the Denominations of the Lands intended to be set out for the Plaintiff's Jointure; but the Person dies before the Conveyance is executed: This alone may be considered as a very proper Circumstance for Relief in this Court; for it is plain by the fullest Proofs in the Cause, that he never altered his Mind, never came to any new Resolution, but always expressed the greatest Uneasiness, that he had not put the last Hand to the Conveyance.

But though this is a sufficient Appointment of the particular Lands, yet I cannot think that any Thing that hath been done, is so conclusive, but that his Lordship may still insist that the Lands set out do exceed the yearly Value of 500 *l.* and that the Complainant on the other Hand may insist they fall short of it. But it must be decreed,

That the Defendant, the Earl of Coventry, do deliver to the Plaintiff the Possession of the Lands comprised in the Deeds of Appointment of the 5th and 6th of July, 1719. and that the Plaintiff do hold and enjoy the same during her Life, against the said Defendant the present Earl of Coventry, and the other Defendants Thomas Coventry and Henry Coventry, and all claiming under them; and that the Defendant, the Earl of Coventry, do account for the Rents and Profits from the Death of Earl Gilbert, &c.



F I N I S.



